MÜNCHENER BEITRÄGE
ZUR PAPYRUSFORSCHUNG UND ANTIKEN
RECHTSGESCHICHTE

67. HEFT

RICHARD A. BAUMAN

IMPIETAS IN PRINCIPEM

A study of treason against the Roman emperor
with special reference to the first century A. D.

VERLAG C. H. BECK MÜNCHEN

MÜNCHENER BEITRÄGE ZUR PAPYRUSFORSCHUNG UND ANTIKEN RECHTSGESCHICHTE

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herausgegeben von
Wolfgang Kunkel, Hermann Bengtson, Erich Gerner und Dieter Nörr

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by
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To Sheila
who once again lived through every word of it

PREFACE

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University of Sydney, R.A.B.
August 1973

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SELECT BIBLIOGRAPHY AND ABBREVIATIONS

The ancient literary sources are designated by the usual abbreviations and are not listed here. Modern works not frequently cited are sufficiently designated in the notes and are similarly not listed here.

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AJP	*American Journal of Philology*.
Arias	P. E. Arias, *Domiziano*, Catania, 1945.
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	of the *Quaestio de Adulteriis*', *Antichthon* 2 (1968), 68 ff.
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CIL	*Corpus Inscriptionum Latinarum.*
CJ	*Codex Justinianus.*
Cloud	J. D. Cloud, ‚The text of Digest XLVIII, 4 Ad Legem Iuliam Maiestatis', *ZSS* 80 (1963), 206 ff.
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Coll.	*Collatio Legum Mosaicarum et Romanarum.*
CP	*Classical Philology.*

CQ	*Classical Quarterly.*
CR	*Classical Review.*
Cramer, *Bookburning*	F. H. Cramer, ‚Bookburning and Censorship in Ancient Rome', *Journal of the History of Ideas* 1945, 157 ff.
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Inst.	*Institutiones Justiniani.*
JAC	*Jahrbuch für Antike und Christentum.*
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JRS	*Journal of Roman Studies.*
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Mus. Helv.	*Museum Helveticum.*
PS	*Sententiarum Receptarum Libri Quinque, Qui Vulgo Julio Paulo Adhuc Tribuuntur.*
PS. Leid.	*Pauli Sententiarum Fragmentum Leidense.*
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TLL — *Thesaurus Linguae Latinae.*

VIR — *Vocabularium Iurisprudentiae Romanae.*

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YCS — *Yale Classical Studies.*

ZSS — *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung.*

I. INTRODUCTORY: ASEBEIA, IMPIETAS AND MAIESTAS

> Maiestatis autem crimen illud est, quod adversus populum Romanum vel adversus securitatem eius committitur. (Ulpian)
>
> Hoc tamen crimen iudicibus non in occasione ob principalis maiestatis venerationem habendum est, sed in veritate. (Modestinus)

I

The existence of a dichotomy – or apparent dichotomy – in the treason laws of the Principate has long been recognised. On the one hand there are the categories that ought to be found in any law dealing with the security of the state – sedition, armed action against the state, conspiracies against the magistrates of the state, treachery in the field or in external relations and misconduct in public affairs, to name only some. Such categories, which are attributed by the jurists to a *lex Julia maiestatis*,[1] go back in all essentials to Republican precedents and will be referred to in this study as ‚the Republican categories'.[2] On the other hand there is the group comprising injuries, whether verbal or real,[3] to the emperor or his deified predecessor, such as the composition or publication of insulting or defamatory words and the desecration of images. This group is the special subject of the present study.[4] Its limits cannot be defined at this stage, except to say that it broadly covered, at the public criminal level, those acts which, at the private level, gave rise to the *actio iniuriarum*. It will mostly be referred to as ‚*impietas in principem*', and sometimes as ‚*iniuria/iniuriae* to the

[1] *Dig.* 48.4.1–4 pr., 10; *PS* 5.29.1 (‚lege Julia ... imperatorem'). On the two or three different *leges* embedded in these sections see Bauman, *CM* 266 ff. For a different view see Cloud, pass.; J. E. Allison & J. D. Cloud, ‚The lex Julia Maiestatis', *Latomus* 21 (1962), 711 ff. For a list of categories see n. 58 below.

[2] The expression is not technical, but agrees closely with Tac. *Ann.* 1.72.3. Cf. at n. 9. Convenience prescribes its use here.

[3] The distinction goes back to at least Labeo. *Dig.* 47.10.1.1. It is common in *maiestas* decrees. Suet. *Claud.* 11.1, *Ner.* 32.2, *Dom.* 12.1. Cf. Dio 60.3.6.

[4] For another subject see at nn. 78–80 below.

emperor', *‚iniuria principis'*, *‚iniuria'* or the like. Even if these expressions are not technical, convenience justifies their use.[5]

The association of insults to the emperor with treason was productive of many anomalies and inconsistencies. Other legal systems know the crime of lèse majesté, of injury to the dignity of the sovereign, alongside what is usually known as High Treason, but as a rule the distinction between the two is clear. It was not so in Rome. Attacks on the dignity, on the *existimatio*, of the ruler were to all appearances regulated by the same laws as attacks on the security of the state, and under some regimes the man who defamed the emperor or desecrated his image risked the death penalty just as effectively as the man who plotted his assassination. This group is the bar sinister on the *maiestas* escutcheon. It is noticed by the jurists only obliquely,[6] but to the literary sources it is the perennial whipping-boy, the proof positive of a ruler's descent into tyranny: the more an emperor could be shown to have reacted to the ‚silly season' categories, to the epigram at the dinner table or the medallion in the privy, the more clearly did he stand convicted of not having possessed a *civilis animus*, of not having been the kind of emperor that those who recorded such facts about him thought he should have been.

A basic question arises. Did the treason laws of the Principate in fact embrace two distinct sets of rules, the one logically connected with the security of the state and the other not, or did everything fall without exception under one and the same statute and one and the same set of rules?

2

There is much confusion about the nature of the *crimen maiestatis* in the Principate, and the original cause is to be found in the primary sources, which seem quite unable to achieve a stable position either terminologically or conceptually. The dilemma is clearly illustrated by two passages in Tacitus dealing with innovations by Augustus. In the one, Tacitus criticises the emperor for having

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[5] Technically the closest is *impietas in principem*. Cf. below pass. and esp. ch. V sec. 4. But it is not confined to insults to the emperor: it also applies to plots against him. Cf. this chapter pass. and esp. the penultimate paragraph. *Iniuria* is technical, but not perhaps in the specialised sense envisaged here. *Iniuria principis* is in Tac. *Ann.* 3.51.2. The correct expression is *maiestas* or *crimen maiestatis*, but that will only become clear in the course of the study. In the meantime the terminological confusion in the sources (below pass.) makes some convenient distinctive phrase advisable.

[6] E. g. *Dig.* 48.4.4.1, 5, 6, 7.3 f.; *PS* 5.29.1 i. f., 5.29.2 i. f.

devised a *(crimen) laesarum religionum ac violatae maiestatis* for the charges against the two Julias and their co-adulterers in 2 B. C. and c. A. D. 8 respectively,[7] and this passage at once suggests that the notion of *impietas*, of what the Greek sources know as *asebeia*, had somehow become associated with treason.[8] In the other passage Tacitus is discussing Augustus' subsumption of defamation under *maiestas*, and he notes this as a signal departure from the Republican categorisation of the crime: ‚legem maiestatis ... cui nomen apud veteres idem, sed alia in iudicium veniebant, si quis proditione exercitum aut plebem seditionibus, denique male gesta re publica maiestatem populi Romani minuisset: facta arguebantur, dicta impune erant.'[9] Elsewhere Tacitus uses the word ‚*maiestas*' with reference to treason some thirty-five times,[10] but although a clear majority of these belong to *iniuria* rather than to the Republican categories,[11] at least three cases have to be allocated to the latter head,[12] so that no firm dividing-line can be postulated for Tacitus. His closest approach to consistency is with ‚*lex maiestatis*', all nine occurrences of which appear to be connected with *iniuria*.[13] But even here no inference can be drawn, for the elder Seneca uses ‚*lex maiestatis*' extensively for typical Republican categories.[14]

The notion, inherent in Tacitus' *laesarum religionum ac violatae maiestatis*, that acts of impiety, acts offensive to the gods, were capable of being dealt with as treason was foreign to the public criminal law of the late Republic,[15] but it

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[7] Tac. *Ann.* 3.24.3.

[8] See at nn. 16–31 below.

[9] Tac. *Ann.* 1.72.3.

[10] Tac. *Ann.* 1.72.4; 1.74.1; 1.74.7; 2.50.1 (bis); 2.50.2; 2.50.4; 3.22.4; 3.37.1; 3.38.1; 3.38.2; 3.44.3; 3.50.6; 3.66.2; 3.67.3; 3.70.2; 4.6.3; 4.19.5; 4.21.3; 4.30.3; 4.31.7; 4.34.3; 4.42.3; 5.5.1; 6.9.5; 6.18.1; 6.38.4; 6.47.1; 12.42.5; 14.48.2. *Hist.* 1.44; 1.77. *Ann.* 4.20.3 (‚legis'); 6.38.4 (‚eadem lege'); 14.48.3 (‚ea lex').

[11] E. g. 1.72.4 (bis); 1.74.1; 1.74.7; 2.50.1 (bis); 2.50.2; 2.50.4; 3.22.4; 3.70.2; 4.19.5; 4.20.3; 4.21.3; 4.34.3; 4.42.3; 5.5.1; 6.38.4 (bis); 14.48.2; 14.48.3.

[12] 3.38.2; 3.44.3; 4.30.3.

[13] 1.72.3; 1.72.4; 2.50.1; 2.50.4; 3.50.6; 4.20.3; 4.34.3; 6.38.4 (‚eadem lege'); 14.48.3 (‚ea lex').

[14] Sen. Rhet. *Contr.* 9.2.13 (ter), 14, 15, 17 (bis) (pp. 387 ff. Müller).

[15] K. M. T. Atkinson, *Iura* 18 (1967), 306, reviewing Bauman, *CM* suggests that Cic. *Verr.* 2.4.27 ‚may well imply that „violated majesty" (implying impiety towards the gods) was already included within the general scope of Sulla's *Lex de maiestate*' and cites ‚the accusation *sacra populi Romani deminuta esse* which was brought against Scaurus in 96 *(sic)* B. C.'. But the Verrine passage should be seen in its context. Verres' crime is here a combination of every possible crime, but *di immortales violati* is in proper perspective in 2.4.28.64, *simulacrum Iovis Optimi Maximi dedicatum* (cf. 2.4.29.66 f.) – a case of *sacrilegium*, of the theft of *res sacra*. Cf. *Dig.* 48.13; Cic. *Rep.* 2.16.40 f. See also Bauman, *Sacrilegium*. Cicero's language is generally extravagant in the Verrines:

was precisely because of the apparent change in this regard in the Principate that it became possible for the Greek sources to find, in the word *asebeia*, an equivalent for *maiestas* that had previously eluded them.[16] Cassius Dio is a case in point. In his discussions of treason trials in the Republic, Dio makes no attempt to devise a standard Greek equivalent for *maiestas* or *crimen maiestatis*.[17] When the facts warrant it he sometimes uses τὸ ἐπιβουλεύειν or συνομοσία,[18] but otherwise he avoids a distinctive label and contents himself with the substance of the charge,[19] even when his source has plainly used the word *maiestas*.[20] In this, of course, Dio shares the inability of the Greek sources as a whole to come to terms with the Latin terminology.[21] Dio is no better off in the

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e. g. 2.1.3.9. In 104 B. C. Cn. Domitius charged Scaurus (Ascon. 21 C) with the improper celebration of sacred rites in his capacity as augur or pontifex (Broughton, *MRR* 1.562 n. 7). It was thus a typical case of *Amtsverbrechen*, dereliction of duty – *maiestas*, but the connection with *sacra publica* is incidental. Moreover, there had to be a special commission to deal with the religious offences of P. Clodius in 61 B. C.

[16] Works on Greek law do not greatly illuminate the connection between *asebeia* and treason. See Lipsius, *Das Attische Recht u. Rechtsverfahren*, Leipzig, 1915, 1.358 ff.; Jones, *The Law and Legal Theory of the Greeks*, Oxford, 1956, 95, 165; *RE* s. v. *asebeia; RAC* s. v. *Asebieprozesse*.

[17] Cf. Bauman, *CM* 1, 229 n. 99a. Dio transliterates *perduellio* in 37.27.2, but never *maiestas*. The μαιεστάτις of Theod. ad *CJ* 9.1.20 is very late.

[18] Dio 28.96.4; 36.40.3; 37.29.4; 37.30.1; 37.34.2,4; 37.39.3; 37.41.2; 38.25.4; 38.26.1; 38.36.3.

[19] Ib. 28.95.3; 36.2.1; 38.10.1 ff.; 39.55.3; 39.56.4; 39.60.4; 39.62.2.

[20] E. g. 39.55.3; 39.56.4; 39.60.4; 39.62.2. Cf. Cic. *Ad Q. f.* 3.1.15, 3.1.24; *Ad Att.* 4.18. Dio 39.56.4 accurately summarises some of the rules of the *lex Cornelia maiestatis*, but does not achieve a better nomenclature than τοῦ νόμου.

[21] Thus Plut. *Caes.* 7.4 f.; 31.2; 62.3,5; *Cat. Min.* 22.1 ff.; 32.3; *Cic.* 39.5; *Crass.* 13.2; *Fab.* 8.3 f.; *Galb.* 2.3; 15.1; 17.3; 27.4; *TG* 14.4 f. App. *B. C.* 1.31; 1.37; 1.96; 2.12; 2.108; 3.26; 3.95; 4.50; 5.66; 5.72; *Iber.* 80, 83. – Appian B. C. 2.24 attempts a Republican *asebeia* when he has A. Gabinius convicted παρανομίας ὁμοῦ καὶ ἀσεβείας for invading Egypt without authority and in defiance of the Sibylline books. But Dio 39.55.4 ff., 56.4, 59 ff. is more convincing: In 55 Cicero tried to have the books read in order to determine the penalty for their contravention; this was blocked, but in 54 they were read and were found to contain no reference to punishment; when Gabinius returned to Rome that year he was charged with leaving his province without authority and failing to hand over to his successor (both *maiestas*); he was acquitted, thanks to Pompey, but was then charged *de repetundis* and convicted. Appian condenses all this into a single trial, has it conducted in Gabinius' absence and in 52, bases the statutory charge – παρανομία – on a law which can only be Pompey's *lex de ambitu* of that year (cf. Broughton, *MRR* 2.234) and has Pompey commended by the senate for ruining Gabinius. Not much can be done with Appian when he is in this state. The charge of *impietas* is a free invention by him, based on his misunderstanding of the Sibylline books incident.

Principate so far as cases of obviously Republican character are concerned,[22] but it is also in the Principate that he is able to make extensive use of the word *asebeia*. This word first appears in his account of Tiberius' accession, where proof of the emperor's *civilis animus* is seen in his refusal to allow shrines or statues of himself to be set up. Tiberius' reasons are stated by Dio as follows:

> He did not want to have to allege that he had been insulted or impiously treated by anyone[23] (they were already using the word *asebeia* for this sort of thing as well, and were basing many charges on it[24]). He rejected all such charges concerning himself, although in this matter as well he exalted Augustus. At first he did not even punish those who had made themselves culpable in respect of Augustus, and even exonerated some who were alleged to have sworn falsely by the Genius of Augustus; but later on he put very many to death.[25]

Dio's τὸ ὑβρίσθαι ἢ καὶ τὸ ἠσεβῆσθαι in this passage bears a strong notional resemblance to Tacitus' *laesarum religionum ac violatae maiestatis*, but his *asebeia* is not an unequivocal *crimen impietatis*. If ‚this sort of thing as well' was being called *asebeia*, something else must previously have been so called, and as no *crimen impietatis* was known in the late Republic *asebeia* is *prima facie* a general equivalent for *crimen maiestatis*,[26] even though here used in what seems to be a specific impiety situation.

In his subsequent uses of *asebeia*, however, Dio is both confused and confusing. A passage in his account of Claudius' accession supplies a good example:

> Far from bearing a grudge against those who had advocated the restoration of the Republic or been considered eligible for the throne, he gave them honours and offices. In the most precise terms ever, and basing himself on Athenian precedent, he promised them immunity; and he kept his promise.

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[22] Dio 54.3.2, 4 ff.; 54.15.1,4; 55.14.1; 57.15.4; 57.18.9; 58.14.3,5; 58.15.1; 58.19.3; 59.18.4; 59.21.4; 59.22.5; 59.23.8; 59.25.5 b ff.; 60.15.4; 60.18.4; 60.29.4 f.; 60.31.8; 61.12.1; 61.26.1.

[23] τὸ γε ὑβρίσθαι πρός τινος ἢ καὶ τὸ ἠσεβῆσθαι πρός τινος.

[24] ἀσέβειάν τε γὰρ ἤδη καὶ τὸ τοιοῦτον ὠνόμαζον καὶ δίκας ἐπ' αὐτῷ πολλὰς ἐσῆγον.

[25] Dio 57.9.1 ff. This passage follows Tiberius' rejection of the title of *pater patriae* and of an oath to his *acta*. Dio 57.8.1,4. Everyone agreed about these two proofs of Tiberius' *civilis animus*. Cf. Tac. *Ann.* 1.72.2; Suet. *Tib.* 26 (also attesting the ruling on shrines and statues). But Tacitus insisted, *Ann.* 1.72.3, that Tiberius' ‚revival' of the *lex maiestatis* had vitiated his claim to a *civilis animus*.

[26] Such an equivalence is assumed by Mommsen, *Strafr* 539 f., but without considering the difficulties. See also A. v. Premerstein, *Vom Werden u. Wesen d. Prinzipats*, 1937, 70 f.; Klingmüller, *RE* 1 A. 1672; Syme, *Tacitus* 1.415; Kornemann, 129 f., 219 n. 81.

> He abolished the charge of *asebeia* (τὸ ἔγκλημα τῆς ἀσεβείας) in respect of both writings and deeds and punished no one for this sort of thing, either for past acts or for those committed subsequently. He did not pursue those who had wronged or insulted him as a private citizen ... with any fictitious charge, but if he found them guilty of some other crime he punished them for that as well. ... He recalled those who had been unjustly exiled by Gaius ... (and) released those who had been imprisoned for *asebeia* and other charges of that sort (ἐπ' ἀσεβείᾳ τοιούτοις τέ τισιν ἑτέροις ἐγκλήμασιν), but punished actual wrongdoers (ὄντως ἀδικοῦντας). He investigated the charges with great care, so that those who had committed crimes should not be released with those who had been falsely accused.[27]

There is something unusual about *asebeia* here: it seems to be concerned with insults to Claudius, and the reference to ‚both writings and deeds' strongly suggests verbal and real *iniuriae;* it is distinct from ‚actual wrongdoing'; and it is ‚fictitious'. The implication seems to be that it is extraneous to the *leges iudiciorum publicorum* (which include the *lex Julia maiestatis*) discussed in *Dig.* 48.4–15 and *Dig.* 48.1.1. But as against this there is τὸ ἔγκλημα τῆς ἀσεβείας, an apparently exact translation of *crimen* (*maiestatis* or *impietatis*, but the latter was unknown).

The remaining occurences of *asebeia* in Dio[28] are largely concerned with insults to the emperor or to a Divus, or with the ‚peculiar' character of the charges that it encompassed. We note especially Caligula's assertion to the senate that by maligning the memory of Tiberius they not only did wrong but committed *asebeia* (οὐ μόνον ἀδικεῖτε ἀλλὰ καὶ ἀσεβεῖτε); Vespasian's cancellation of the disabilities of those who had been condemned for acts of *asebeia*, ‚as they were called' (ἐπὶ ταῖς λεγομέναις ἀσεβείαις); Titus' refusal to entertain charges of *asebeia* on the grounds that he himself could not be insulted and that if past rulers were in fact demigods they would avenge themselves; and Macrinus' remission of the life sentences that had been imposed ‚for a sort of *asebeia*' (ἐπ' ἀσεβείᾳ τινί).[29] The allusion to ‚a sort of *asebeia*' is followed by an explanatory note: ‚that is, the sort of *asebeia* that is said to refer to the emperors' (οἵα γε ἡ ἀσέβεια αὕτη ἡ ἐς τοὺς αὐτοκράτορας λέγεται γίγνεσθαι). This last comment puts the difficulty in its most acute form. What was the *asebeia* that was said to refer to the emperors – a special kind of *impietas* or a special kind of *maiestas*?

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[27] Dio 60.3.5 ff., 4.1 ff.

[28] Dio 57.19.1; 57.21.2; 57.23.2 f.; 58.4.5; 59.4.3, 6.2; 59,11.6; 59.16.2; 59.16.8; 59.22.8; 63.18.2; 64.3.4 c; 65.9.1; 66.19.1; 68.1.2; 79.12.1.

[29] 59.16.2; 65.9.1; 66.19.1; 79.12.1.

The well-known passage in which Dio purports to have Maecenas tender Augustus some advice[30] also belongs here: the word *asebeia* is not used, but the implication is clear. Maecenas tells Augustus that criminal jurisdiction over senators should be entrusted to the senate, although only for offences for which laws have been passed and which are judged according to those laws. As for charges arising out of insults to the emperor, he should not entertain them, for he should consider himself above insult and should induce the same attitude in others, so that they may attribute to him the same sanctity as they do to the gods. But if anyone is accused of plotting against him he should not overlook it, although he should refer such charges to the senate rather than deal with them himself.[31] Once again ‚offences for which laws have been passed' is a reference to the *leges iudiciorum publicorum,* and the inference is that insults to the emperor are extraneous to those laws, although conspiracies against him are not.

What of the ‚*impietas*' which obviously attracted Dio's attention in his sources and suggested to him his first equivalent for *maiestas*? The *Thesaurus Linguae Latinae* lists six examples of *impietas in patriam, imperatorem,* but of these only four are specially linked to the *crimen maiestatis:* Tac. *Ann.* 6.47.2, a charge of *impietas in principem* against a certain Albucilla, and charges against a number of men *ut conscii et adulteri eius;* Plin. *Ep.* 7.33.7, a charge of verbal injury; Plin. *Pan.* 33.3 f., another charge of verbal injury; and Tert. *Apol.* 35.10, a passage in which Tertullian condemns those – Avidius Cassius and other forcible assailers of the throne – who offer sacrifices *pro salute imperatoris* and swear by the emperor's Genius on the very eve of their outbursts of impiety *(sub ipsa impietatis eruptione).* Tertullian's attestation is of special interest, not only because it emanates from an older contemporary of Dio and a possible jurisconsult[32] but also because it furnishes a clear example – and they are not easily come by – of *asebeia/impietas* being used to denote a conspiracy against the emperor and not merely an affront to his dignity. This weakens the force of Dio's separation of conspiracies from insults in the Maecenas speech, but elsewhere Tertullian himself falls victim to the endemic confusion. For example, in his defence of the Christians he accurately distinguishes between their refusal to worship the Roman

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[30] On whether Dio is here speaking for the Augustan period or the Severan see Bleicken, ‚Der politische Standpunkt Dios gegenüber der Monarchie', *Hermes* 87 (1962), 444 ff. Our passage is at home in the Severan period but by no means out of place in the Augustan.

[31] Dio 52.31.3 f., 5, 8 f.

[32] Beck, *Römisches Recht bei Tertullian u. Cyprian,* 1930, 39 ff. identifies Tertullian as the author of *Dig.* 1.3.27, 29.1.23, 29.1.33, 41.2.28, 49.17.4. Contra Kunkel, *Herkunft* 236 ff.

gods and their refusal to offer sacrifices for the emperor, arguing that the former supports a charge of *sacrilegium*[33] (more correctly, the *crimen laesae Romanae religionis* which originated in or shortly before the Severan period[34]), while the latter gives rise to the *crimen maiestatis;*[35] but he rudely shatters the logic of this when he goes on to say that the *maiestas* on which the second charge is based is *Caesariana maiestas,* in respect of which the gods have established a *secunda religio.*[36]

The uncertainties of the literary sources are reflected by the late classical jurists. The word *impietas* does not occur,[37] but *impius* does. The passage is *PS* 5.29.1 *(Ad Legem Juliam Maiestatis):*

> Quod crimen non solum facto, sed et verbis impiis ac maledictis maxime exacerbatur.

This should be compared with Modestinus *Dig.* 48.4.7.4:

> Crimen maiestatis facto vel violatis statuis vel imaginibus maxime exacerbatur in milites.

Both passages are corrupt, but if we read them together[38] and apply a modified version of the therapy recommended by Mommsen[39] we may possibly see these fragments as enclosing a doctrine which ran something like this:

> Crimen maiestatis non solum facto, veluti violatis statuis vel imaginibus, sed et verbis impiis ac maledictis maxime exacerbatur.

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[33] *Apol.* 10.1.

[34] Ib. 24.1, 27.1. Cf. Bauman, *Sacrilegium* 180ff. Add *CJ* 9.19.1 (A. D. 240). *Sacrilegium* was not a synonym for *maiestas* in our period. Cf. Bauman, *CM* 131, 221 f., 288 ff. Contra Kübler, 551, who detects a ‚*sacrilegium*' in Dio's source, but in such a case one might have expected Dio to use ἱεροσυλία rather than ἀσέβεια. Cf. Mommsen, *Strafr* 760 n. 6.

[35] *Apol.* 28.3; cf. 10.1, 29.1. See also Waltzing & Severyns, *Tertullien: Apologétique,* Paris, 1929, 68; Bauman, *Sacrilegium* 180ff.

[36] Tert. *Ad Nat.* 1.17.2. Cf. *Apol.* 31.2, 35.5.

[37] Its occurrences in later legislation are not connected with treason. See *CTh* 8.13.1 pr. = *CJ* 8.55.7.1; *Nov. Maj.* 6.1 pr. Cf. *VIR* s. v.

[38] Cf. Cloud, 226 f., citing Cujacius.

[39] Mommsen's *crimen maiestatis facto, veluti violatis statuis vel imaginibus, exacerbatur maxime in milite* for Modestinus should also be applied to *PS:* as the latter stands, its ‚exacerbatur *facto*' is meaningless. But Mommsen's *in milite* is unnecessary: there is no such limitation in *PS.* In any event, even if a special case had been discussed here it would point to a general principle to the same effect.

Such a doctrine agrees well with Dio's constant theme and is also consistent with Tertullian's position, and it may be no accident that it is found in sources broadly contemporaneous with those authors.

There is another striking correlation between Dio and the jurists in the following confirmation by Modestinus *Dig.* 48.4.7.3 of the ‚fictitious' character of charges concerning insults to the emperor:

> Hoc tamen crimen iudicibus non in occasione ob principalis maiestatis venerationem habendum est, sed in veritate.[40]

Even Maecenas' advice in regard to ‚offences for which laws have been passed' is repeated, in essence, by Modestinus loc. cit.:

> Quamquam enim temerarii digni poena sint, tamen ut insanis illis parcendum est, si non tale sit delictum, quod vel ex scriptura legis descendit vel ad exemplum legis vindicandum est.

And most unexpectedly of all, Dio's repetitive ‚*asebeia* and other charges of that sort' is exactly echoed by Ulpian *Dig.* 28.3.6.11:

> Quorum memoria post mortem damnata est, ut puta ex causa maiestatis vel ex alia tali causa.

It is clear that Dio could have got all his requirements from contemporary specialists, but he could also have got most of them from earlier sources. Tacitus' *(crimen) laesarum religionum ac violatae maiestatis* is one, and when he criticises that charge as having exceeded Augustus' own laws[41] he plainly foreshadows the Severans' dislike of ‚fictitious charges'. He also says that the senate suspected that the charges of *impietas in principem* in A. D. 37 were *ficta*.[42] Two statements by Tacitus' contemporary, the younger Pliny, also belong here, namely his

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[40] Cloud, 226, following Kübler, 543, rejects *principalis maiestatis* as a fourth century development so far as ‚official designations of the emperor' are concerned. Perhaps so, but *maiestas imperatoris* was ‚official' in the Severan period, judging by *CJ* 9.8.6 pr., 6.1, and its ‚unofficial' currency goes back even further: Tac. *Ann.* 1.46.2, 5.5.1; Tert. *Apol.* 29.4. The context of Suet. *Aug.* 25.1 suggests that *maiestas mea* was used by Augustus. Cf. Suet. *Aug.* 37 *(maiestatem eius imminui)*; Ov. *Pont.* 2.8.30. See also Suet. *Dom.* 12.1 *(m. principis)*; Tert. *Ad Nat.* 1.17.2; *Apol.* 31.2, 35.5; *CIL* 8.10570 *(m. tua* – Commodus); *CIL* 6.254 *(m. imp. Antonini)*. See also Bauman, *CM* 198 ff.; Gaudemet, pass. See also n. 59 below.

[41] Cf. at n. 7. The laws in question were *Julia maiestatis* and *Julia de adulteriis*. Bauman, *CM* 201 ff.

[42] Tac. *Ann.* 6.47.4.

assertion that Tiberius consecrated Augustus in order to activate the *crimen maiestatis*[43] and his dismissal of that *crimen* as the last resort of those who have no charge at all.[44] Finally, Ovid's complaints about the way in which he was driven into exile[45] take the awareness of judicial anomaly right back to where it all began.

3

Modern scholars have proposed a variety of solutions in their search for firm ground in this matter. At one time it was thought that the answer lay in a *crimen impietatis* distinct from the *crimen maiestatis*, but this was refuted by J. F. H. Abegg[46] and does not seem to have cropped up since, although scholars have remained aware of an area of notional impiety within the confines of the *crimen maiestatis*.[47] The eighteenth century romanist, Balduinus Franciscus, postulated a formal distinction between *maiestas imperatoria* and *maiestas populi Romani*, and the consequent segregation of the Caesars from the state;[48] to this his most recent follower, E. Koestermann, adds that the separation was accomplished by a special *lex* going back to the last years of Augustus.[49]

Mommsen did not attempt to construct a system. His division of *Staatsverbrechen* into six groups[50] is not intended to be anything more than illustrative, as he himself makes clear; moreover, it does not bear directly on the special problems of *impietas in principem*. The groupings of other scholars, such as E. Pollack, B. Kübler and H. Drexler,[51] are similarly for illustrative purposes only. Mommsen's only venture into something more specific is on the relationship

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[43] Plin. *Pan.* 11.1.

[44] Ib. 42.1.

[45] Ov. *Trist.* 2.131 f.; *Pont.* 2.9.71.

[46] Abegg, pass. See also F. W. Lear, ‚*Crimen Laesae Maiestatis* in the Lex Romana Wisigothorum', *Speculum* 4 (1929), 73 ff.; ‚Blasphemy in the Lex Romana Curiensis', *Speculum* 6 (1931), 445 ff.

[47] Cf. n. 26.

[48] Balduinus Franciscus, ‚Ad leges majestatis sive perduellionis libri', *Jurisprudentia Romana et Attica Heineccii*, Lugd. Batav., 1738, 1.1014: ‚Non temere tamen est quod Tacitus, ubi de iudiciis majestatis quaeritur, admonet discernenda esse rei publicae et Caesarum; nam et sub his alia novaque majestatis definitio esse coepit.'

[49] Koestermann, *Majestät* 77, *TA* 1.237.

[50] *Strafr* 546.

[51] Pollack, 200 n. 1; Kübler, 549 f.; Drexler, ‚Maiestas', *Aevum* 30 (1956), 195 ff. at 202 ff.

between *perduellio* and *maiestas*, when he observes that ‚jede landesfeindliche Handlung ein Majestätsverbrechen, aber nicht füglich jedes Majestätsverbrechen eine landesfeindliche Handlung genannt werden kann'.[52] This is useful as an aid to understanding, but it has exerted an influence far exceeding, one suspects, anything that its author intended. A dictum of R. S. Rogers will serve to illustrate the point: ‚It is perfectly clear ... that all cases of *maiestas* were not of the same nature, that Augustus' law of *maiestas* comprehended the old charge of *perduellio* as well as less serious charges such as those *de famosis libellis*.'[53] The slightly festive atmosphere of ‚less serious charges ... *de famosis libellis*' is completely misleading. The sources are critical of Augustus' decision to subsume defamatory words under *maiestas*, but nowhere do they suggest that the new category of treason was ‚less serious': it was different, but it was *maiestas*. A recent investigator goes even more seriously astray when he refers to ‚the old concept of Perduellio, i. e. the crime of acting with malice towards the Roman people, and those provided by the new laws *de maiestate*, where the fault is more one of culpable negligence'.[54] It is not clear where this doctrine of accidental treason comes from. It is not known to the sources, and seems to be due to the mistaken belief that the only alternative to malicious intent was no intent at all.[55]

A. H. J. Greenidge, writing some years before Mommsen's *Strafrecht*, suggested that in respect of some of its categories the *lex Julia maiestatis* had looked at the same act in two different ways, classifying it as *perduellio* if it had been done with hostile intent and as *maiestas* if it had been done without such intent.[56] This division of the *lex* into *perduellio* and *maiestas* chapters covering the same ground is unfortunately not acceptable, partly because of doubts about the fragment attributed to Ulpian in *Dig.* 48.4.11 on which it depends,[57] and partly because it presupposes a sliding-scale of penalties quite inconsistent with the fact that there was only one statutory penalty – *aquae et ignis interdictio*. Moreover, although the juristic texts *Ad Legem Juliam Maiestatis* do fluctuate between acts which are culpable if done *dolo malo* and acts which are culpable if done at all,

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[52] *Strafr* 539.

[53] Rogers, *Trials* 6 f.

[54] C. W. Chilton, ‚The Roman law of treason under the Early Principate', *JRS* 45 (1955), 74.

[55] When negligence is discussed in connection with *maiestas*, as in *Dig.* 48.4.5.1, it does not condemn; it excuses.

[56] Greenidge, *Treason* 230 ff. and esp. 232.

[57] See Bauman, *CM* 287 f. with lit. Add Bleicken, 28 n. 4; Cloud, 228 ff.

they do not exhibit any consistent or rational basis for the distinction.[58] But Greenidge did at least avoid the constrictions of act X always being ‚more serious' and act Y always ‚less serious', and his paper points the way to a more flexible approach.

4

What are we looking for in this matter of *impietas in principem*, and how do we hope to find it? The basic problem is the distinction drawn by the sources between categories securely anchored in the *leges iudiciorum publicorum* (meaning, for our purposes, the *lex Julia maiestatis*) and categories adrift in the extra-legal limbo of *asebeia/impietas* and ‚fictitious charges'. This distinction must, if only because it is subscribed to by the late classical jurists, be given serious consideration, although in the end the jurists will be seen to have been no more successful than the historians in isolating a meaningful dividing-line. We may begin with Modestinus *Dig.* 48.4.7.3, a passage to which reference has already been made. Modestinus appears to lay down two propositions: first, that the test of liability under the *crimen maiestatis* should not be *principalis maiestatis veneratio;* and second, that liability should be confined to acts satisfying the criterion *quod vel ex scriptura legis descendit vel ad exemplum legis vindicandum est.*[59] In other

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[58] The following had to be done *dolo malo:* executing hostages without authority (48.4.1.1); inciting to sedition *in urbe* (ib.); conspiring to assassinate a magistrate or a holder of *imperium* or *potestas* (ib.); bearing arms against the state (ib.); assisting the enemy (ib., also 48.4.4); usurping magisterial functions (48.4.3); inciting to subversive activity (48.4.4); betraying an army (ib.); frustrating the subjugation of an enemy (ib.); alienating friendly nations (ib.); and surrendering a province or *civitas* to the enemy (48.4.10). The following do not mention *dolo malo:* inciting soldiers to sedition (48.4.1.1); retaining a province after the arrival of a successor (48.4.2.3); desertion (ib.); making false entries in public records (48.4.2); surrendering military positions (48.4.3); making war or raising troops without authority (ib.); releasing confessed criminals (48.4.4); and injuring consecrated statues of the emperor (48.4.6, and the one non-Republican case in this list). *PS* 5.29.1 cuts a different cross-section: (i) acts imputed to the one *cuius ope consilio* they were done, namely bearing arms against the emperor or the state, and betraying an army (*dolo malo* cases in *Dig.* 48.4); and (ii) acts imputed directly to the perpetrator, namely making war or raising levies without authority, inciting soldiers, deserting (non-*dolo malo* cases in *Dig.* 48.4).

[59] Our reliance on this passage is fully justified in spite of the insistence of Cloud, 224ff. and De Dominicis, *Studi Biondi,* Milan, 1965, 2.653 and nn. on a post-classical origin. The ideas expressed in the passage were developed long before the post-classical period. Among the many correspondences, mention may be made of the ‚nec lubricum

words, the *crimen maiestatis* should not be involved in the godlike aspect of the emperor; its business is with categories expressly stated in the *lex Julia maiestatis* or interpreted into that *lex*. This suggests that there were certain categories not connected with the *lex Julia* at all, categories that had never been subsumed under the *crimen maiestatis populi Romani minutae*. This is in fact an illusion as far as Modestinus' own times are concerned, but there was a time when it was true, and although it was of short duration it left an indelible imprint on the image of the *crimen maiestatis* in the Principate. It all goes back to the trials of 2 B. C. arising out of the adulteries of the elder Julia. Tacitus, as we have already observed, says that the charge was *laesarum religionum ac violatae maiestatis*, and adds that in giving this solemn name to the common offence of adultery Augustus exceeded his own laws – *suas ipse leges egrediebatur*. As the writer has argued in a previous work, the conclusion that should be drawn from this is that adultery with the emperor's daughter was not subsumed under the *crimen maiestatis p. R. minutae*. Two distinct heads were raised in the indictment in respect of such adultery: in so far as it violated the personal majesty of the *pater patriae* (not the *maiestas* of the Roman people) it was charged as *violata maiestas;* and in so far as it breached certain *religiones*, certain obligations to the emperor fortified by oaths – notably the oath of allegiance, but the *religio* aspect of tribunician sacrosanctity also came into it –, it was charged as *laesae religiones*.[60]

It is important to bear in mind that in formulating the charges of 2 B. C. the emperor was not purporting to vindicate his own godliness: he was vindicating *maiestas* on his own behalf, and godliness on behalf of the gods (Jupiter will have been one of them) by whom the oaths had been sworn. It is only by some such distinction that *laesarum religionum ac violatae maiestatis* can be given a viable meaning. The alternative is to interpret this phrase as a hendiadys and, disregarding *suas ipse leges egrediebatur*, to suppose that offences against the Roman gods were subsumed under the *crimen maiestatis p. R. minutae*. But *suas ipse leges egrediebatur* cannot easily be forced away from the extra-legal connotation that it naturally bears;[61] and, even more pertinently, there is no conceiv-

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linguae ad poenam facile trahendum est' of the passage and Tiberius' ruling in A. D. 32. Cf. ch. IV at nn. 190–92. See also Bauman, ‚The *leges iudiciorum publicorum* and their interpretation', *Aufstieg und Niedergang der Römischen Welt*, vol. 3 (forthcoming).

[60] Cf. Bauman, *CM* ch. 11, esp. 206 ff.

[61] Cf. n. 60. Critics of the writer's proposals either dismiss Tacitus because he is not being technical or deny that he portrays Augustus as having proceeded extra-legally. What more could Tacitus have said than ‚culpam ... gravi nomine laesarum ... maiestatis appellando'? Why should he have invented this indictment? As for the effect of Tacitus' words, they speak for themselves. If there had been a subsumption under the

able reason why Augustus should have wanted to elevate offences against the Roman gods to treason. Not only had there been no such elevation in the Republic, but even in Tertullian's day there was a clear difference between the *crimen laesae Romanae religionis* and the *crimen maiestatis:* the latter embraced the *secunda religio* attaching to *Caesariana maiestas,* but it did not embrace the *religio* connected with the Roman gods.[62] Consequently, if Augustus had wanted to make *laesae religiones* a category of the *lex maiestatis,* the only way would have been by importing a *religio* attaching to himself; but that is out of the question, for Augustus was not a god during his lifetime. The distinction was no doubt very fine and inherently capable of causing confusion, since the *religiones* that had been breached in fact touched on the emperor's interests very closely, thus making him the real injured party even if technically the injury was to the gods; but such confusion may not have been unwelcome to the *pater patriae.*[63]

The *laesarum religionum ac violatae maiestatis* formulation of 2 B. C. should be seen as the first step in the erection of penal safeguards around *principalis maiestatis veneratio.* But this step had no immediate sequel,[64] for the next development in the area of *impietas in principem* lay in a different direction. In A. D. 8 Augustus elevated verbal injury to treason, and on this occasion there was no question of extra-legal proceedings: there was a specific subsumption of defamation under the *crimen maiestatis p. R. minutae,* an extension of the *lex Julia maiestatis,* and Tacitus is the first to say so.[65] Modestinus would also have been perfectly satisfied, for this was the type of new category, the *quod ad exemplum legis vindicandum est,* that he was prepared to accept. This extension of the *lex maiestatis* will be discussed in chapter two,[66] where, besides identifying the

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lex maiestatis it could surely not have been described, even non-technically, as ‚suas ipse leges egrediebatur'. An interpretation might attract many criticisms, but not that it was *ultra vires.* Due weight must also be given to *‚primus ... cognitionem ... tractavit'* in Tacitus' account of Augustus' creation of the crime of verbal treason. *This,* and not the trials of 2 B. C., is to Tacitus the beginning of the *gravissimum exitium.* It is noticed in Book I of *Annales,* whereas the trials of 2 B. C. are not noticed until Book III.

[62] Cf. at nn. 33–36 above.

[63] On the criminal law implications of the status of *pater patriae* see Bauman, *CM* 235 ff. See also below pass.

[64] Except for the case of the younger Julia, but that did not add anything to the concept. Cf. Bauman, *CM* 242 ff.

[65] *Tac. Ann.* 1.72.4: ‚primus Augustus cognitionem de famosis libellis *specie legis eius* tractavit.' There is no suggestion of a ‚fictitious' charge in ‚specie'. Cf. *Lex. Tac.* s. v. *species.*

[66] This question was discussed previously by the writer in *CM* ch. 12. But it needs to be restated, modified and amplified for the purposes of the present study. It is therefore proposed to present the whole matter *de novo* on the much broader basis now required.

ordinance that effected the extension, two important propositions will be submitted. It will be argued, first, that the extension was initiated in order to carry out a normal ‚Republican' function of the *lex maiestatis*, namely to suppress sedition; and second, that the extension did not originate as a measure for the special protection of the emperor's reputation at all: it originated as a measure for the protection of any person of rank, any *inlustris*, and although the vast majority of cases did involve the emperor there were cases involving other *inlustres* as well. These attributes of the defamation category of *maiestas* suggest a possible line of demarcation – although only a notional and subjective one – within *impietas in principem* itself rather than between that concept and the Republican categories: some injurious acts were generally conceded to have a realistic bearing on the security of the state, and no one objected to their subsumption under *maiestas;* but other acts were seen (by critics of the regime) as too remote, and it was then that the extra-legal origins of *principalis maiestatis veneratio* in 2 B. C. were remembered, and the result was ‚fictitious charges' and other criticisms of that sort.

The two tentative ventures of Augustus, the one into *asebeia/impietas* on an extra-legal basis and the other into defamation under the aegis of the *lex maiestatis*, raised a dichotomy that was to plague the *crimen maiestatis* for the rest of its history. Difficulties began being encountered almost immediately after the accession of Tiberius, and they were engendered above all by the *asebeia/impietas* formulations of 2 B. C. The dividing-line between *laesae religiones* and *violata maiestas*, between injuries to the gods and injuries to the emperor, was an unstable one. The evidence of Tertullian suggests that it might have maintained its footing quite comfortably if no new factor had supervened, but it was quite unable to survive the consecration of Augustus. The impact of the new god on the concept of treason was inevitable and immediate. To the *populus Romanus*, Divus Augustus was not just another god – he was also their old ruler, and they were most anxious to know where they and this new composite entity stood towards each other. But no foundation charter had been drawn up for Divus Augustus at the time of his consecration, and they would have to find some other way of plotting the co-ordinates of his position. The obvious way was through the *crimen maiestatis*. The *lex maiestatis* could not confer positive powers on the new god, but it could enumerate what the living were *not* to do to him, and in this way it would in effect be defining his position.[67] For example, if a rule arises making it *maiestas* to desecrate his effigies, people very soon come to realise that

[67] The *lex maiestatis* had similarly helped to define Augustus' position in his lifetime. Bauman, *CM* 273 ff.

they may make themselves immune from molestation by grasping such objects, and this rapidly hardens into a positive right of asylum. In this way the Divus acquires something of a constitutional status. It has no roots in the Republic, but it does express the new realities of the Principate. The Divus becomes a factor in the institutionalisation of the Principate, he helps to cater for the needs of the new regime and he assists in its consolidation.

The task of assembling a constitutional portfolio for Divus Augustus was put in hand at the very beginning of Tiberius' reign. It was a very different task from that which had been undertaken on behalf of the Roman gods in 2 B. C., for it was now quite specifically and unequivocally a question of subsuming injuries to this particular god under the *crimen maiestatis p. R. minutae*. The many anomalies and absurdities in such an assimilation provoked strenuous resistance from Tiberius, but the pressures proved to be too strong and the emperor had to give way. The ancients were well aware of the decisive impact on the *crimen maiestatis* of the early rulings regulating the position of Divus Augustus. Thus, Pliny contended that the whole purpose of Tiberius' consecration of Augustus had been to activate the *crimen maiestatis* and strike terror into citizens;[68] and Suetonius thought the same, judging by the fact that his catalogue of cases illustrating Tiberius' rigorous enforcement of the *lex maiestatis* consists entirely of cases relating to Divus Augustus.[69] Tiberius' reluctance to admit the new category was also well known. Suetonius discloses it indirectly;[70] Dio attests it in his fashion;[71] and Tacitus, after noting cases concerning Divus Augustus as the beginning of the *gravissimum exitium*,[72] has Tiberius declare – in what seems to be a deliberate refutation of Pliny – that Augustus' consecration had not been decreed in order to be turned to the destruction of citizens.[73]

The sources are not mistaken, for there were in fact two forces at work. Not everyone wanted to see the empire turned into a theocracy, and least of all a rationalist like Tiberius, but that was what it would very soon become if the tremendous energies locked up in the Divus were given free rein. Therefore a limit had to be set to the enlargement of the Divus. He was a most useful collaborator, a most convenient focus for new institutions and concepts, but he could

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[68] Plin. *Pan.* 11.1 f.: ‚dicavit caelo Tiberius Augustum, sed ut maiestatis crimen induceret. tu sideribus patrem intulisti non ad metum civium.'

[69] Suet. *Tib.* 58.

[70] Cf. his discussion, *Tib.* 67.2 ff., of Tiberius' reasons for refusing the status of *pater patriae*.

[71] Cf. Dio 57.9.1 ff. See also n. 25 above.

[72] *Tac. Ann.* 1.73.

[73] Ib. 1.73.3: ‚non ideo decretum patri suo caelum, ut in perniciem civium is honor verteretur.'

not be the senior partner: once the initiatives taken on his behalf had borne fruit, the further regulation of affairs should be left to the emperor and he himself should recede into the background. This proposition is strikingly illustrated by the history of the right of asylum.[74] It is also confirmed by the sources. Very few cases concerning the Divi are known. Apart from Suetonius' catalogue of unnamed defendants, there are exactly six cases involving Divus Augustus, together with one case involving a Diva under Caligula and another under Nero. Something more positive than neglect of the Divi can be postulated for Domitian, for that emperor gave expression to his strong centralising bent by actively opposing the enlargement of Divus Titus, even to the extent of using the *lex maiestatis* to prevent it; and even this was not original, for Titus himself had advocated a similar line in his lifetime.

The position of the emperor himself was much more complex than that of the Divus. Unlike the latter, there were several areas of the *lex maiestatis* with which he could be associated quite naturally. He could, for example, be protected against assassination in the same way as Republican magistrates;[75] he could exercise the special powers in provincial and external affairs conferred on the Princeps by the *lex Julia maiestatis* in 27 B. C.;[76] and even when he was protected against defamation it was as an *inlustris* and under a category logically connected with the security of the state. But pressures rapidly built up for the assimilation of his position to that of the Divus, for his subsumption under the *asebeia/impietas* categories that had, through the rulings in favour of Divus Augustus, found their way into the *lex maiestatis*. A number of factors contributed to this. There was no doubt a general feeling that the Divi filius should be on the same level as the Divus, a realisation that it was not appropriate for the ruler to be seen to be inferior to the predecessor: it would not do, for example, for the *imagines* of the Divus to confer asylum when those of the reigning emperor did not. The status of the *pater patriae* will also have had something to do with it. This does not apply to Tiberius, whose recollection of the part played by that status in the formulation of 2 B. C. led him to set his face resolutely against a similar status for himself,[77] but it does apply to some of his successors. To a large extent, however, it was simply popular pressure, the deep-rooted need of the Roman people to express their feelings of awe and reverence in the most meaningful way that they knew – through their law.

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[74] Cf. ch. IV sec. 3.

[75] Thus *Dig.* 48.4.1.1: ‚cuius opera consilio malo consilium initum erit, quo quis magistratus populi Romani quive imperium potestatemve habet occidatur.'

[76] Bauman, *CM* 273 ff.

[77] Suet. *Tib.* 67.2 ff. Cf. n. 70.

The equation of the emperor with the Divus in the matter of *asebeia/impietas* placed the emperor in a most uncomfortable position, for it obliged him to be constantly wearing two hats: under his one aspect he was a proper subject for the *lex maiestatis*, but under his other aspect there were those who thought he was not. The point of demarcation was, however, never established with any degree of precision. Tiberius tried very hard to frame a viable criterion and used *renuntiatio amicitiae* in preference to the public criminal law whenever possible. Some of the jurists of the day helped him, notably in the matter of *imagines imperatoris*, and it was precisely in that matter that a considerable measure of lasting success was achieved. But in the end the relentless pressures for the enlargement of the public criminal sphere of *iniuriae* to the emperor, and for the more positive acceptance of *asebeia/impietas* within that sphere, proved impossible to resist. The emperor's *divina maiestas* would not begin to be fully expressed in terms of the *crimen maiestatis* until Caligula, but there were many who believed in it long before that, and in the last year of Tiberius' reign they succeeded in getting a charge on record under the specific designation of *impietas in principem*. The problems that troubled Tiberius did not trouble all of his successors, for rulers like Caligula, Nero and Domitian exploited the institutionalising possibilities of *divina maiestas* with some enthusiasm, but no one ever really succeeded in coming to terms with the many-sided concept of *impietas in principem*. The late classical period professed to think that only the ‚heavy' categories, conspiracies and the like, were worthy of notice by the public criminal law – and yet plots against the emperor were ‚*impietas*'. And a jurist like Ulpian, *Dig.* 28.3.6.11, might dislike the *ex alia tali causa* categories intensely, but he could not deny that such categories were part of the law, that they represented acts that had in fact been subsumed under the *crimen maiestatis p. R. minutae*.

There is another question besides *impietas in principem* to which consideration will be given in this study, and that is that important institution of the Principate that it is proposed to call ‚the abolition of charges of *maiestas*'.[78] This institution will be discussed both for its intrinsic interest and importance and for the considerable, and indeed almost decisive, light that it is able to shed on the question of whether or not there was any real dividing-line within the *crimen maiestatis*. An example of an abolition of charges of *maiestas*, by Claudius, is discussed by Dio in a passage to which reference has already been made,[79] and

[78] This concept is discussed briefly by Mommsen, *Staatsr* 2.961 f. and in somewhat more detail by Bleicken, 118 ff. Waldstein includes some useful observations in his discussion of *amnestia*, but his real purpose lies elsewhere. See also Birley, ‚The oath not to put senators to death', *CR* 12 (1962), 197 ff.; Garnsey, 44 f.

[79] Cf. at n. 27.

the institution is attested for nearly every emperor from Caligula to the Severi. The pattern was that the emperor was invited on his accession to abolish charges of *maiestas*, and to do so not only by pardoning past acts but also by unconditionally renouncing such charges for the future. Most emperors accepted the invitation to furnish this infallible proof of a *civilis animus*, and even though very few undertakings were honoured, the fact that they were given at all is enough. If what was abolished was the *crimen maiestatis* in all its parts, both the ‚more serious' and the ‚less serious',[80] how could any state have jettisoned the prime safeguard of its security in this way, or any emperor, no matter how civic-minded, have proclaimed an open season for treachery and plots? ‚Exim continua discordia, non mos, non ius.' To make matters worse, the tradition unanimously credits Claudius with having honoured his undertaking throughout his reign, despite the fact that the same sources unblushingly attest conspiracies against him and the punishment of the conspirators. There are also difficulties with other emperors.

There are, short of damning the tradition out of hand, two possibilities. The one is that what was abolished was indeed the *crimen maiestatis* in all its parts, and that during the periods of its abeyance the purposes that it normally served were, irrespective of whether they pertained to the security of the state or to the reputation of the emperor, accomplished in other ways. The other possibility is that something less than the totality of the *crimen maiestatis* was abolished, and therefore *iniuriae* to the emperor, the segment so closely identified by the sources with the absence of a *civilis animus*. This clearly presupposes something more than notional segregation within the *crimen maiestatis*, for it requires a separate originating ordinance identifying what was being abolished – possibly an edict under the *maiestas* clause (*FIRA* 1.156) of a *lex de imperio*, although the views of Bleicken, 67f. and the silence of the sources (in contrast to cases like *Dig.* 48.10.15 pr.) might incline us against such a solution. In any event the argument adumbrated in the next paragraph implies that a special edict is not the answer. The matter will, however, be raised again.

It is proposed to argue that the first alternative, the total abolition of the *crimen maiestatis* in all its parts, is the correct one. Despite appearances – and many more anomalies than those noticed here will be uncovered –, the emperor who agreed to abolish charges of *maiestas* did in fact deprive himself of this particular safeguard of his security and reputation in its entirety, and in the case of at least Claudius, Titus, Nerva and Trajan he continued to do without it throughout his reign. But compensation was found in a wide range of substitutes,

[80] So Bleicken, 29, 100, 119.

some protecting the emperor's security and others his reputation, some judicial and others extra-judicial, some resulting in death and others in lesser penalties, but all displaying great ingenuity and testifying to the extraordinary flexibility of the Roman legal mind. These substitutes did more than just make up for the absence of the *crimen maiestatis:* in some respects they outdid it, and in the case of one remedy in particular the position got so bad that the senate was obliged – the supreme irony! – to seek protection from the consequences of abolition by demanding from the emperor an oath not to put senators to death.

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It remains to state in outline how the investigation of *impietas in principem* and of the abolition of charges of *maiestas* will be conducted. There are no precedents, for as far as can be ascertained a study of this sort has not been attempted before.[81] A straightforward chronological approach would not do, for it would tend to be a history of reigns rather than of categories and concepts. The best prospects seem to be offered by a thematic approach, an inspection in depth with, as far as possible, chronological arrangement within each theme. As for the particular themes to be selected, it is neither possible nor desirable in so complex a matter to create watertight compartments. Numerous questions are equally at home under two or more heads, but they cannot be in two places at once and a choice has to be made. The main consideration in making such a choice is the attachment of like to like, the juxtaposition of what in category or concept should not be put asunder, but in some cases it is not possible to avoid pursuing a question partly under one head and partly under another. This is particularly the case with the substitutes for the *crimen maiestatis*. These arise naturally in the course of different themes and cannot be isolated without a serious loss of clarity.

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[81] Older writers, such as Rein, 543 ff., give lists of cases of little more than narrative value. Abegg is somewhat more ambitious, but although he effectively refutes the *crimen impietatis* he is not quite sure what to put in its place: there is a nostalgic echo of a bygone age of romance in ‚(Die) Rechtsgelehrten, die auch unter den traurigsten Verhältnissen mit Gefahr ihres Lebens für das Recht und die Gerechtigkeit das Wort führten'. Mommsen, *Strafr* 583 ff. is (predictably) more systematic than his predecessors, but dislike of what he considers a juristic monstrosity dictates excessive brevity and compression. The position is no different with Pollack, 202 ff. or Kübler, 550 ff. The historians are rather more expansive, especially for Tiberius, as the works of Marsh, Rogers and Koestermann show, but their purpose is usually a political interpretation of the emperor rather than a clinical examination of his criminal jurisprudence. For a survey of the literature on verbal injury and *maiestas* see ch. II, nn. 3–5.

Turning now to the details of the exposition, the second chapter will, besides dealing with the matters to which attention has already been drawn,[82] uncover the special rôle of the *lex Cornelia de iniuriis* as a reservoir from which categories were drawn for elevation to *maiestas* and also as a statute in its own right pursuing a parallel course to the *lex Julia maiestatis*. The *lex Cornelia* will thus be seen as the first substitute for the *lex maiestatis* during periods of abolition.

A detailed discussion of *impietas in principem* will be initiated in chapter three. This chapter will deal with two preliminary matters. The first is the admissibility of the evidence of slaves against their masters in *maiestas* cases. This topic, which will have been touched upon in chapter two, will be further scrutinised in the first section of chapter three. The discussion will be built around the question of why the delators concentrated on charges of *maiestas* as tenaciously as they did, and it will be argued that one of their motives was in order to avail themselves of the almost unique advantages of the servile evidence rule. Another important consequence of this rule was that the *crimen maiestatis* was able to be used as a device for the detection of other crimes, quite apart from its normal repressive function.

The second section of chapter three will be concerned with occult practices. It will be argued that the *lex maiestatis* did not cover such practices in the Principate. It was only in the fourth century that there was an extension, and even then it was a qualified one. As a result of the non-involvement of the *lex maiestatis* in this area in the Principate, charges concerning occult practices were a substitute for *maiestas* during periods of abolition.

The subject of chapter four will be the Divus and the emperor. This chapter is intended to show how the Divus was brought under the protection of the *lex maiestatis*, and then to trace the institutionalising consequences of that subsumption with special reference to the right of asylum, provincial misconduct and imperial solidarity. These themes will be studied in relation not only to the Divus but also to the emperor. The chapter will conclude with some post-Tiberian developments in the matter of the Divus and the *lex maiestatis*.

Chapters five and six will concentrate on *impietas in principem* in relation to the emperor alone rather than in conjunction with the Divus. Chapter five will take up this theme in respect of Tiberius. The topics will be, first, *renuntiatio amicitiae* as an alternative to the *crimen maiestatis* in respect of insults to the emperor not realistically describable as threats to his security or to the security of the state; second, the systematic exploitation of the defamation category of *maiestas* by Sejanus; third, some leading cases in the period following Sejanus'

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[82] Cf. at n. 66.

fall; and fourth, the specific charge of *impietas in principem* in 37. The chapter will also show how, towards the end of the reign, attempts were made to absorb *renuntiatio amicitiae* completely into the public criminal law.

In chapter six, the themes for Caligula will include the impact of *divina maiestas* on the *lex maiestatis* and the connection between the *querela inofficiosi testamenti* and the *crimen maiestatis* – both examples of institutionalisation. For Nero the discussion will be focussed on the revival of the *lex maiestatis* in A. D. 62 – the first since Claudius' abolition. Cases of verbal injury prior to 62 will be examined and will be found to corroborate the parallel rôle postulated for the *lex Cornelia de iniuriis*. Evidence pointing to there having possibly been a second cessation of the *lex maiestatis* after the revival of 62, followed by a second revival late in 65, will be presented, but it will be concluded that a single revival, in 62, is slightly more probable. The discussion of Nero will conclude with some important questions of *iniuria* raised by the trial of Thrasea Paetus. Passing on to the Flavians, the one case discussed for Vespasian is that of the elder Helvidius Priscus; this case will give us our first glimpse of the doctrine of manifest guilt which constituted such a vital substitute for the *crimen maiestatis* during periods of abolition. For Domitian the major themes will be the trials of Herennius Senecio, Arulenus Rusticus and the younger Helvidius Priscus, which will be seen as having further advanced imperial solidarity; the relationship between Domitian and his gladiators, a striking case of the enlargement of the imperial corpus; the case for a period of dormancy of the *lex maiestatis* in the early years of the reign; and Domitian's use of his *censoria potestas*, which will be identified as yet another substitute for the *crimen maiestatis* and will be shown to have been put to similar use by Claudius. The chapter will conclude with the curious episode of Pliny's attempt to revive the *lex maiestatis* early in Nerva's reign.

Chapter seven will examine the connection between adultery and *maiestas* subsequent to the trials of 2 B. C. Tiberius refused to sanction such a connection in A. D. 17, and as the reversal by him of an act of Divus Augustus is unlikely, our view that there was no formal subsumption of adultery under the *lex maiestatis* in 2 B. C. receives important confirmation. Tiberius permitted slaves to be examined against their masters in adultery cases, thus giving the *accusatio adulterii* the same special advantage as the *crimen maiestatis* and creating yet another substitute for that *crimen*. The main theme in the chapter will be the doctrine of manifest guilt, the punishment of the manifest wrongdoer after securing a manifestation of popular support in the shape of *populi furor*, but without preferring charges. This question will be pursued through the case of Valeria Messalina, with support from the case of Octavia.

The work will conclude with a study, in chapter eight, of the abolition of charges of *maiestas*. The chapter will, of course, be concerned with the *crimen maiestatis* as a whole and not only with *impietas in principem*. After inspecting some important matters of nomenclature, attention will be directed to the abolitions of individual emperors. The order in which this question is being taken up is in deliberate disarray. Claudius is the crucial case, and he will be examined first. The tradition for his unbroken abolition will be tested against the cases that might endanger such a position, and it will be shown that a substitute remedy was used in every case and that the *crimen maiestatis* was never employed. Two additional substitutes will be uncovered in the course of the discussion – a devious rule concerning servile evidence and the conception of *quasi crimina*. Turning then to Caligula, the wording and scope of the abolitionary decree will be considered, and general conclusions in regard to such wording and scope under all emperors will be formulated. Attention will also be given to the reasons for Caligula's revival of the *lex maiestatis*. For Nero the principal theme will be the attempt to charge Agrippina, and for Titus the new departure represented by the oath not to put senators to death. The discussion of the oath will include our final observations on the manifest wrongdoer. The main topic for Marcus will be his employment of the *crimen parricidii* as a substitute for *maiestas*, and the chapter will conclude with the question of whether Tiberius was ever invited to abolish charges of *maiestas*.

It will be noticed that conspiracies against the emperor, although just as much part of *impietas in principem* as insults, are not being given the same systematic treatment as the latter. Some conspiracies are examined in detail in chapter eight in order to show how they were suppressed without making use of the *crimen maiestatis* and in chapter four the assassination of the emperor is examined as an aspect of imperial solidarity, but for the rest such matters are noticed only in passing. The reason is that the legal principles regulating this category – ‚cuius opera consilio malo consilium initum erit, quo quis magistratus populi Romani quive imperium potestatemve habet occidatur'[83] – had been fully worked out in the Republic, thus making its further study in the Principate a matter of political rather than of legal history. For similar reasons other Republican categories are not specially considered. An exception is the discussion of the ill-treatment of provincials in chapter four, and this is included for the precise reason that a new principle, namely the treatment of such conduct as an affront to the Divus and the emperor, was being worked out.

[83] *Dig.* 48.4.1.1. On this passage, and especially on the applicability of the rule to the emperor, see Bauman, *CM* 149, 171 ff., 206 ff., 211 and n. 40, 279 ff., 287.

The investigation of the various matters outlined above will run, in the main, from the last decade of Augustus to Domitian. This is partly because an examination in depth is difficult once Tacitus, and to some extent Pliny, Suetonius and the unabridged Dio, are left behind, and partly because there were, on the whole, not many developments of note after the first century. Marcus is significant on the abolition of charges of *maiestas*, and this will receive due consideration. Commodus ought to have provided an extensive repertoire, but for some reason no significant advances can be detected in his reign. Various points of interest will be noticed for Pertinax and the Severans, and there will be brief forays into the later empire in the matters of legislation *de famosis libellis* and occult practices.

II. DEFAMATION AND MAIESTAS

I

Tacitus says that Augustus was the first to deal with defamatory writings under the title of the *lex maiestatis*, having been prompted thereto by Cassius Severus' unconscionable attacks on distinguished men and women:

> Primus Augustus cognitionem de famosis libellis specie legis eius tractavit, commotus Cassii Severi libidine, qua viros feminasque inlustres procacibus scriptis diffamaverat.[1]

This passage, the principal source for Augustus' association of defamation and *maiestas*, raises complex questions of date, motive and method. It also raises a problem of identity. Tacitus does not portray Augustus as taking steps to protect his own reputation, but as intervening on behalf of *inlustres*. The evidence will support Tacitus, for in some trials what seems to be the *lex maiestatis* will be found defending the reputations of persons who are distinctly not the emperor or members of his *domus*, and who, not being magistrates, do not even qualify under the special rule known to Quintilian.[2] Such cases will have to be either justified as *maiestas* on some other ground or referred to a different juristic head altogether.

The literature on Augustus' creation of verbal treason is, on the whole, less searching than one might have hoped. The romanists are helpful on matters germane to their discipline,[3] but historians have largely been content to assume

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[1] Tac. *Ann.* 1.72.4.

[2] *Inst. Orat.* 5.10.39: ‚iniuriam fecisti, sed quia magistratui, maiestatis actio est.'

[3] See especially Levy, 1.108 ff.; H. Volkmann, *Zur Rechtsprechung im Principat des Augustus*, Munich, 1935, 86 ff., 207; Avonzo, *Iudicium* 174 ff. and pass., *Senato* 22 f.; Bleicken, 35 f.; Gaudemet, 708; Kunkel, *Senat* 37 f.; and Daube. The difficulties did not escape Mommsen, *Strafr* 794 f., 800, 801 and nn. 1, 3, 4, but he chose to be Delphic about it. Rein is still useful. Some guidance is to be had from Greenidge, *Infamia* pass.; M. Kaser, ‚Infamia u. ignominia in den römischen Rechtsquellen', *ZSS* 73 (1956), 220 ff.; J. M. Kelly, *Princeps Iudex*, Weimar, 1957, 44 f.; and M. Marrone, ‚Considerazioni in tema di „Iniuria"', *SAR* 475 ff. A. Ronconi, „„Malum Carmen" e „Malus Poeta"', Ib. 958 ff. is important. Augustan verbal treason is noticed by Kübler, 551 only briefly, and by E. Bund, ‚Maiestas', *Kl. P.* 3.897 ff. not at all. G. Pugliese, *Studi sull' „iniuria" I* was not available.

some sort of action by Augustus without attempting to say what it was;[4] some have even doubted whether the crime of verbal treason existed under Augustus at all.[5] Recently, however, some more positive positions have been taken up, notably by E. Koestermann and R. E. Smith. The former postulates a *lex Julia de maiestate* going back to ‚den allerletzten Jahren des Augustus' and segregating the person of the Princeps from the *res publica*,[6] while the latter suggests a *senatus consultum* dating to ‚the earlier years of Augustus' reign'.[7]

Koestermann's dating is undoubtedly correct, and the solution to be propounded here will identify A. D. 6 and A. D. 8 as the specific dates. But the special *lex* proposed by Koestermann is not possible. That the *lex Julia maiestatis* of the juristic sources made special provision for the Princeps in provincial and external affairs is probable,[8] but that *lex* was passed in the first or second decade of the reign, and it dealt with the emperor's powers under certain Republican categories, not with his personal dignity;[9] nor is there any point in thinking of a second Augustan *maiestas* law late in the reign, for of such a law there is not the slightest trace.[10]

Instead of looking for a special *lex*, we should be looking for an interpretation of a known *lex* – that is, of the *lex Julia maiestatis*. We will therefore be looking for a *senatus consultum*, and to that extent our search will be along similar lines to those followed by Smith. The decree in question should, in conformity with the normal canons of interpretation, have been based on some category in the *lex* itself capable of furnishing an analogy, and the obvious choice is the sedition category to which legislators habitually turned when they wished to enlarge the *crimen maiestatis* by extensive interpretation.[11] But this category was not chosen

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[4] Furneaux, 1.274 nn.; Ciaceri, 254; Brzoska, *RE* 3.1745 f.; Marsh, 61, 106; Syme, *RR* 486 f.; M. Fuhrmann, *Kl. P.* 1.1076. See also Cramer, *Bookburning* 169 ff.

[5] Cramer, *Astrology* 249 n. 10 cites R. S. Rogers as having argued in *Augustus and lèse majesté* that, ‚in spite of Tacitus' assertion, Augustus did not institute the maiestas procedure in cases of libel and slander', but extensive enquiries have failed to unearth this work of Rogers. Some hints by Rogers himself, *CP* 55 (1960), 19 ff., *SAR* 123 ff., suggest that he was still of the same opinion, but do not disclose his reasons.

[6] Koestermann, *Majestät* 77, *TA* 1.237. Cf. Rogers, *Trials* 7 (before his doubts arose); Kornemann, 128 ff.

[7] Smith, 179 and pass. See also n. 72.

[8] Cf. Bauman, *CM* 272 ff.

[9] Ib. 275 ff., 272 f.

[10] Ib. 284 ff.

[11] *Dig.* 47.22.1.1,2 makes the activation of *illicita collegia* presumptively equivalent to the seizure of *loca publica vel templa* and brings the former under the *quaestio perpetua* vested with jurisdiction over the latter. This is the *quaestio maiestatis* if the *qui*

at random. It was chosen because it was apposite in the circumstances, and we should therefore look – and indeed, in view of what Suetonius has to say about Augustus' attitude to defamation in general,[12] must look – for a situation in which both sedition and defamation played a part.

2

The starting-point for the investigation is the Augustan *senatus consultum* attested by Suetonius:

> Etiam sparsos de se in curia famosos libellos nec expavit et magna cura redarguit ac ne requisitis quidem auctoribus id modo censuit, *cognoscendum posthac de iis, qui libellos aut carmina ad infamiam cuiuspiam sub alieno nomine edant.*[13]

We note the tense of *edant*, which suggests that Suetonius was transcribing from an actual copy of the decree and lost the temporal thread of his sentence; and the general scope postulated by ‚ad infamiam *cuiuspiam*', which partly corresponds with Tacitus' ‚qua viros feminasque inlustres diffamaverat', except that *inlustres* is more restricted than *cuiuspiam*.

A decree that gives every indication of being the same as that known to Suetonius is attested by Dio. He says that in A. D. 6 there were serious disturb-

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hominibus ... iudicati sunt of 47.22.2 belongs to the same category as the *quo armati homines ... ad seditionem convocentur* of 48.4.1.1. So Bauman, *CM* 78 f., 263 f., 268. The other possibility is the *quaestio de vi*. So Mommsen, *Strafr* 662 f.; F. M. De Robertis, *Il Diritto Associativo Romano*, Bari, 1938, 1.100 ff., but with reservations, 340 n. 42: ‚Si può bene pensare che si trattasse di un crimen oscillante ... tra il crimen violentiae e quello lesae (sic) maiestatis.' *PS* 5.26.3 is not, *pace* De Robertis, o. c. 340 n. 42, in point: the *vis privata* there discussed is distinguishable from *Dig.* 47.22.2, 48.4.1.1 by the fact that it envisages not the ringleader but the mere participant. Cf. perhaps A. W. Lintott, *Violence in Republican Rome*, Oxford, 1968, 109 n. 1. The *lex de vi* envisaged by the *s. c.* of 56 B. C., Cic. *ad Q. fr.* 2.3.5, cannot have been passed, for if it had been *Dig.* 47.22.2 would be obsolete law. There is an as yet not fully understood connection between the *crimen de vi* when the act was *adversus rem publicam* and the *crimen maiestatis*. See Bauman, *CM* 281 f. with lit.; and, for a full discussion, Lintott, o. c. 107 ff. Any future attempt to solve the problem will lean heavily on the investigations of Labruna.

[12] Suet. *Aug.* 51, esp. 51.3: ‚aetati tuae, mi Tiberi, noli in hac re indulgere et nimium indignari quemquam esse, qui de me male loquatur; satis est enim, si hoc habemus ne quis nobis male facere possit.'

[13] Ib. 55.

ances bordering on revolution, and that the situation was being aggravated by the posting of pamphlets (βιβλία) by night; the ringleader was said to be a certain Publius Rufus, but it was suspected that others were making use of his name (cf. *sub alieno nomine);* the senate decreed that an investigation be held and that rewards be offered to informers; informers began coming forward, but this only created further unrest, and the disturbances continued until the grain shortage abated and games were given in honour of Drusus.[14] Dio does not mention any convictions or even trials, and we are left with the impression that the investigation was a failure. Moreover, in an earlier part of his account of A. D. 6 Dio says that with many senators absent from Rome because of the famine, it was resolved that whatever senators were present at a session would constitute a quorum,[15] from which we conclude that the investigation of pseudonymous pamphleteering may have been authorised by a poorly attended senate.

The decrees of Suetonius and Dio are linked not only by their subject-matter but by the fact that Suetonius also has a decree with an inconclusive result. The proof is his assertion that Augustus did not seek out those who had defamed him and simply obtained a decree for future use – a curious statement, in view of the well-known Roman aversion to legislating *in vacuo*.[16] The situation in A. D. 6 must indeed have been serious if necessity had to be dressed up as a virtue. But Suetonius has made one thing clear: if he says it was intended for future use he means it was put to future use, and there is no question of its having been an *ad hoc* remedy which lapsed when it failed to accomplish its purpose.

The *senatus consultum* of A. D. 6 is our first fixed point. Its date is secure; it authorised the investigation of pseudonymous *libellos aut carmina* defamatory of any person; it offered rewards to informers; and it was prompted by the use of pamphleteering as an incitement to sedition. *Prima facie* it is the ordinance we are looking for,[17] nor is its credibility impaired by the fact that Cassius Severus was not tried until A. D. 8 or 12, for Suetonius has prepared us for a delay. In the end, however, we shall not be able to maintain that it is precisely the measure by which Augustus made defamation treason, although it will still be seen to have played a vital part in that monumental step.

Our next reference point is the date of Cassius Severus' trial. His death in

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[14] Dio 55.27.1–3.

[15] Ib. 55.26.1 f.

[16] Cf. Bauman, *CM* 69 f., 71 n. 32 with lit.; ib. *Duumviri* 24 f. and n. 22.

[17] It was so accepted by the writer in a previous work. See Bauman, *CM* 253, 256, 260 ff., 264 f.

A. D. 32 was noticed by Jerome as having occurred in the twenty-fifth year of his exile,[18] which gives c. A. D. 8 as the date of his trial,[19] but Dio seems to be referring *inter alia* to the trial of Cassius in his account of certain proceedings which he assigns to A. D. 12. He says that Augustus, learning of the composition of certain defamatory pamphlets (βιβλία ἅττὰ ἐφ' ὕβρει τινῶν), ordered a search to be made, caused such documents as were found to be burnt, and punished some of the authors.[20] Dio's terminology is good (ἐφ' ὕβρει τινῶν = *in notam aliquorum*[21]); his assertion that the documents were burnt by the aediles in Rome and the local officials elsewhere is a replica of what he says about the known *senatus consultum* against Cremutius Cordus;[22] and although he does not name the authors of the pamphlets, it is a fact that Cassius' works were destroyed[23] and a reasonable supposition that this was at the time of his trial.[24] The only question is therefore the date.

There are two reasons for thinking that Dio's chronology may be wrong, and that the correct date may be that transmitted by Jerome. The first is a slight trace of what may be a doublet of the proceedings *de famosis libellis:* under A. D. 8 Dio notices Augustus' feeble state of health but adds that in spite of this he continued to attend to (unspecified) judicial business; and under A. D. 12 he again remarks on Augustus' enfeeblement and says that in spite of this he continued to attend to his duties, namely a measure admitting *equites* to the tribunate and the proceedings *de famosis libellis*.[25] Second, Dio's A. D. 12 is a much too peaceful year. There is neither famine nor sedition, and the only discordant note is the trials and certain more rigorous regulations for exiles to which Dio adverts immediately after the trials. These regulations provided for the removal of those who had been sentenced to *aquae et ignis interdictio* (πυρὸς καὶ ὕδατος εἰρχθέντα – the terminology is again good) from the mainland to remote islands, and for limitations on their ships and servants and a ceiling of 500,000 sesterces on their properties.[26] This elevation of penalty from *aquae et ignis interdictio* to

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[18] R. Helm, *Eusebius Werke: Die Chronik des Hieronymus*, Berlin, 1956, p. 176.

[19] Cf. Avonzo, *Senato* 22 and n. 22 with lit.

[20] Dio 56.27.1. Cf. Bleicken, 35 and n. 1 with lit.; Smith, 178 f.; Kunkel, *Senat* 37.

[21] Cf. at n. 108.

[22] Dio 57.24.4. Cf. Tac. *Ann.* 4.35.5.

[23] Suet. *Cal.* 16.1.

[24] Cf. Cramer, *Bookburning* 177.

[25] Dio 55.33.5; 56.26.2 f., 27.1.

[26] Ib. 56.27.2. The property restriction was more onerous to the wealthy than the half-confiscation imposed by Caesar's *lex Julia maiestatis* (cf. Bauman, *CM* 162, 165 f.) but less onerous to those of modest means.

deportatio in insulam[27] was not because of a few insults in an otherwise tranquil year. What is needed is a time of unrest, and for this the obvious candidate is A. D. 7–8. It was a time of extreme danger. The famine of A. D. 6 was repeated, the Pannonian and Dalmatian revolts broke out, and there were renewed disturbances.[28] It was also in A. D. 7 (according to Dio[29]) that Agrippa Postumus was banished. The complexities of that opaque episode cannot be unravelled here,[30] but it has possible links with verbal treason. The first is Cassius Severus. He was an inveterate enemy and defamer of Paullus Fabius Maximus,[31] and the latter was an *amicus* of Augustus and had a lot to do with the suppression of Agrippa Postumus,[32] from which it is a reasonable inference that Cassius' libels were connected with the crisis of Agrippa and the succession.[33] Another possible link is Ovid. He was exiled in A. D. 8 (for a *carmen*[34]) and may have been implicated in an Agrippan conspiracy in some way.[35] A third possibility is the two *e plebe homines* who were punished, Junius Novatus with a fine for publishing an *asperrimam epistulam* against Augustus under the name of Agrippa

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[27] Mommsen's assertion, *Strafr* 974 (cf. 957) that Dio merely attests ‚Internierung' and that ‚der Deportation als selbständige Strafe' only originated in A. D. 23 is not supported by the evidence. See Levy, 2.337 n. 96. Cf. 1.110, 2.348 and pass.

[28] Dio 55.31.3.

[29] Ib. 55.32.1 f. On the date see below.

[30] For whatever can be said see M. L. Paladini, ‚La Morte di Agrippa Postumo e la congiura di Clemente', *Acme* 1954, 313 ff.; F. Norwood, ‚The riddle of Ovid's relegatio', *CP* 58 (1963), 150 ff.

[31] Sen. *Contr.* 2.4.11.

[32] Cf. Koestermann, *TA* 1.80. He was Augustus' *comes unus* on the visit to Agrippa on Planasia. Tac. Ann. 1.5.2. Even if the visit is suspect (Syme, *Tacitus* 1.306 ff., 2.482 f., 692 f.), the fact that rumour settled on Paullus is significant.

[33] On Agrippa and the succession crisis see Paladini, o. c.; Norwood, o. c. Contra Koestermann, *TA* 1.76, but not convincingly.

[34] The writer, *CM* 243 f., followed the *communis opinio* in taking this to be the *Ars Amatoria*. But its date, eight years before Ovid's relegation, is against it. The *s. c.* of A. D. 6 was anything but retroactive. Why not a *carmen ad infamiam cuiuspiam*? A short piece composed in his cups is suggested by *Trist.* 3.5.47 f.: ‚non aliquid dixi, violentaque lingua locuta est, lapsaque sunt nimio verba profana mero.'

[35] Cf. Norwood, o. c. 154 ff. But there are many difficulties in Ovid's case, especially his claim, *Trist.* 2.131 f., to have been condemned neither by the senate nor by a *iudicium publicum*. Cf. Bleicken, 30; Bauman, *CM* 244. When Ovid says, *Pont.* 2.9.71, ‚nec quicquam, quod lege veter committere, feci', he in fact asserts that he was not dealt with *specie legis eius*. Kunkel's suggestion, *Senat* 37 n. 51, that Ovid was not tried because he had admitted his guilt is one way out of the difficulty. A slight variation of that opinion, namely that Ovid's guilt was manifest, may be even better.

Postumus, and Cassius Patavinus with *levi exilio* for boasting that he lacked neither the will nor the courage to kill Augustus.[36]

Finally there is Agrippa Postumus himself. Dio tells us that he was in the habit of defaming Livia and Augustus and that in A. D. 7 he was exiled to the island of Planasia and suffered confiscation of his property for the benefit of the *aerarium militare*.[37] Suetonius says that he was first sent to Surrentum and from there to Planasia, and that the latter transfer was by *senatus consultum*.[38] Dio, it is to be noted, knows nothing of the sojourn at Surrentum on the mainland, but on the strength of Suetonius the change of Agrippa's place of exile to a remote island,[39] rather than his initial internment there, should be assumed, so that in fact Dio has given us, in A. D. 7, a case on all fours with the regulations for exiles that he insists on dating to A. D. 12. Moreover, the *senatus consultum* attested by Suetonius makes it certain that the transfer to Planasia was pursuant to a trial.[40] We may conclude with some confidence that the trial of Cassius Severus was in A. D. 7–8 (and more probably in the latter year[41]) rather than in A. D. 12.[42]

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[36] Suet. *Aug.* 51.1.

[37] Dio 55.32.1 f. The libels had gone on for a long time before action was taken. Vell. 2.112.7. The same delay, in effect, as that attested by Suetonius for the *s. c.* of A. D. 6.

[38] Suet. *Aug.* 65.1, 4 and esp. ‚in insulam transportavit ... cavit etiam s. c. ut eodem loco in perpetuum contineretur.'

[39] Planasia is outside the limit of 400 *stadia* from the mainland specified by Dio 56.27.2 as a clause of the new regulations for exiles.

[40] There is a close parallel with the final settlement of accounts with Cassius Severus after a lenient first sentence. See at n. 119.

[41] See at n. 106 on Augustus' edict of A. D. 8.

[42] Titus Labienus has at first sight a better claim than Cassius Severus to recognition as the first victim of the new *maiestas* category, in view of the assertion by Seneca Rhetor *Contr* 10 pr. 7 that the burning of Labienus' books by order of the senate was the first of its kind. In fact, however, Cassius is not seriously threatened. It is probable that no formal charges were preferred against Labienus and that the burning of his books was the only penalty inflicted on him. An extra-forensic remedy such as this was known in the Republic. G. W. Clarke, ‚The Burning of Books and Catullus 36', *Latomus* 27 (1968), 575 ff. with lit. Cf. A. Forbes, ‚Books for the Burning', *TAPA* 67 (1936), 114 ff. See also Cramer, *Bookburning* pass. A similar remedy is clearly attested for the Principate. Sen. *Contr.* 10 pr. 3. Cf. Cramer, o. c. 189 f. Add the case of Cremutius Cordus, since his suicide probably frustrated a formal conviction but not a *s. c.* condemning his books. See *Tac. Ann.* 4.35.5; Sen. *Ad Marc.* 1.3, 22.7; Dio 57.24.4. Suet. *Tib.* 61.3 is confused. An important fact for Labienus is Dio's assertion, 56.27.1, that *all* the works discovered in the search of A. D. 12 (= A. D. 8) were destroyed, but that only *some* of the authors were punished.

3

Tacitus has told us that the *lex maiestatis* was used by Augustus to protect *inlustres*, and not merely the emperor himself, against libels, and there are cases later on in the first century to back this up. The first is the case of Fabricius Veiento, who in A. D. 62 was expelled from Italy and subjected to an order for the burning of his books, on the grounds that he had composed many insults against senators and priests in books which he had called ‚his codicils': ‚quod multa probrosa in patres ac sacerdotes composuisset iis libris quibus nomen codicillorum dederat.'[43] This ingenious attempt to take advantage of the fact that Augustus had vetoed a proposal to restrain freedom of speech in wills[44] is noticed by Tacitus immediately after the case of Antistius Sosianus, who had been charged under the *lex maiestatis* for reciting *probrosa adversus principem carmina*,[45] and Fabricius is said to have been ruined by a similar charge – *haud dispari crimine* – to that which had been preferred against Antistius.[46] There were also, it is true, charges of *ambitus* against Fabricius, and it was because of these that Nero tried the case himself,[47] but Tacitus has no doubt that the case turned mainly on the libels.[48] It is also true that Tacitus says that men read Fabricius' works while it was dangerous to do so but stopped as soon as the ban was lifted,[49] but the danger was in reading something in defiance of the decree for the burning of the books,[50] not in reading an attack on the emperor – there is no suggestion of such an attack in the case. Finally, the matter cannot be explained by the doctrine of *iniuria magistratui* known to Quintilian, for the *patres et sacerdotes* were not magistrates, or at any rate not all of them.[51] But they were certainly all *inlustres*, and this case appears to corroborate the legal position implied by Tacitus in his notice of the case of Cassius Severus.

Another case that belongs here is that of Claudius Timarchus of Crete, who was charged in the same year as Fabricius Veiento with having insulted the senate by repeatedly claiming that it depended on him whether votes of thanks were rendered to governors of Crete: ‚una vox eius ad contumeliam senatus penetraverat, quod dictitasset in sua potestate situm an pro consulibus qui Cretam

[43] Tac. Ann. 14.50.
[44] Cf. Suet. *Aug.* 56.1.
[45] Tac. *Ann.* 14.48.1 f.
[46] Ib. 14.50.1. See also n. 126.
[47] Ib. 14.50.1 f.
[48] ‚Haud dispari crimine ... conflictatus est.'
[49] Ib. 14.50.2.
[50] Cf. Cramer, *Bookburning* 194 and n. 173.
[51] Cf. n. 2.

obtinuissent grates agerentur.' On the motion of Thrasea Paetus he was expelled from Crete.[52] The innuendo was that Timarchus had the senate in his pocket, that it was not a free agent to decide whether votes of thanks could be presented before it.

The doctrine on which the cases of Fabricius Veiento and Claudius Timarchus rested probably originated earlier than Nero's reign, for the case of Titius Rufus who committed suicide in A. D. 39 when charged with saying that the senate thought one way and voted another[53] seems to belong to exactly the same line of development. It may have been the first of its kind, since no earlier example is attested.

Our final example of the apparent use of the *lex maiestatis* to protect any *inlustris* is supplied by Pliny, from the reign of Domitian. Pliny and Herennius Senecio, acting on behalf of the provincials of Baetica, had brought charges of extortion against Baebius Massa, a former governor of the province and also well known as a delator under Domitian. Massa having been condemned and his property having been sequestrated in order to secure payment of the provincials' claims, Senecio approached the consuls for an order ensuring the safety of the property while it was in public custody.[54] Thereupon Massa, alleging that Senecio was actuated by malice rather than by his duty to his clients, lodged a charge of *impietas* against Senecio: ‚vixdum conticueramus, et Massa questus Senecionem non advocati fidem, sed inimici amaritudinem implesse impietatis reum postulat.' There was general consternation at this, but Pliny came to the rescue with the observation that by not charging Pliny as well, Massa had insinuated that Pliny was guilty of collusion against his clients: ‚vereor ... ne mihi Massa silentio suo praevaricationem obiecerit, quod non et me reum postulavit.'[55] Pliny's purpose was obviously to face Massa with the threat of a counter-charge, and in that way to persuade him to drop his charge against Senecio. This brilliant counter-stroke (Pliny himself, never a modest man, so regarded it) won general approval, including a letter of commendation from Nerva, at that time a *privatus*,[56] and was instrumental – we need have no doubt of it – in securing the abandonment of the charge against Senecio.[57]

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[52] Tac. *Ann.* 15.20.1 f. Cf. n. 126.

[53] Dio 59.18.5.

[54] Plin. *Ep.* 7.33.4: ‚ne bona dissipari sinant, quorum esse in custodia debent.'

[55] Ib. 7.33.7 f.

[56] Ib. 7.33.3, 9 f.

[57] Cf. Sherwin-White, 425, 741, 766. There is no trouble with *tergiversatio* (on which see Mommsen, *Strafr* 498 ff.) in such a *quid pro quo*. See *Dig.* 48.16.4 pr.: ‚mulier, quae falsi crimen iniuriae propriae post interpositam denuniationem desistens omisit, ex senatus consulto Turpilliano teneri non videtur.'

It is quite certain that the *impietatis postulatio* lodged by Massa against Senecio is not the charge of treason which ultimately destroyed the latter,[58] but the alternative proposed by A. N. Sherwin-White, that *impietas* here is not treason at all but a breach of Senecio's duty to his clients,[59] is not an acceptable solution. Even if Senecio was over-officious, he was merely seeking better protection for the property out of which his clients' claims would be paid, and in what way was this a *betrayal* of their interests? He might have breached professional etiquette and exposed himself to a senatorial rebuke,[60] but a *crimen inofficiosi patrocinii* (if such a charge was known[61]) is scarcely conceivable here.[62]

In general terms the situation was one in which mutual accusations of defamation were being bandied about. Massa's complaint was that Senecio's approach to the consuls carried the innuendo that the property might be tampered with, and Pliny's complaint was as follows: he had in fact accompanied Senecio to the consuls,[63] and if that was defamation on Senecio's part it was also defamation on Pliny's part; but Massa had omitted Pliny from the *impietatis postulatio*, and had thereby implied that Pliny had not gone to the consuls, that he had neglected his clients' interests and was guilty of *praevaricatio*. Massa was complaining either on his own behalf[64] or on behalf of the custodians of the property[65] *(iniuria magistratui)* – or even on behalf of the emperor within whose gift their offices lay.[66] His *postulatio* is thus not an unequivocal example of the *lex maiestatis* defending the reputation of someone who is neither the emperor nor a magistrate, but merely an *inlustris*. But Pliny's threatened counter-postulation against Massa is such an example. Pliny did not hold magisterial office at this

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[58] Sherwin-White, 242, 425, 446, 766.

[59] Ib. 446 f.

[60] Cf. Bauman, *Pliny* 135 f.

[61] If there had been any question of Senecio having betrayed his clients the charge might have rested on the ancient rule *patronus si clienti fraudem faxit sacer esto*. Serv. ad *Acn.* 6.609.

[62] Sherwin-White, 446 is even less lucky with his suggestion that Massa's complaint was akin to a charge of *calumnia* or *praevaricatio*. *Calumnia* could only have come into it if the charges *de reptundis* against Massa had failed. Cf. Mommsen, *Strafr* 491 ff. And *praevaricatio* would have required collusion between Senecio and Massa. Mommsen, *Strafr* 501 ff.

[63] Plin. *Ep.* 7.33.6 f.

[64] He was an *infamis*, having already been condemned *de repetundis*, but that did not affect his right to bring a charge of *maiestas*. Cf. *Dig.* 48.4.7.

[65] They were the consuls (Brunt, 195) or guardians appointed by the consuls (Sherwin-White, 445). But why not the quaestors?

[66] The link between magistrates and the emperor's *existimatio* was important in the extension of *iniuria principis*. Cf. the use of Domitian's gladiators, ch. VI at nn. 187–98.

time (despite attempts to make this the period of his praetorship[67]), and there is thus no question of his complaint resting on *iniuria magistratui* or on the emperor's *existimatio*. He was proposing to defend his own reputation, and to do so in his capacity as an *inlustris*.[68]

4

A provisional explanation for Tacitus' *inlustres* having been found, the next question is how the case put by Suetonius, the ‚ad infamiam *cuiuspiam*' category, fits into the picture. That this is a much broader criterion than *inlustres* is self-evident: it is completely general in scope, taking in anyone and everyone, and not merely the distinguished. Just to state such a possibility for the *lex maiestatis* is to raise doubts, for although libels could logically be seen as actually or potentially seditious when directed at the governing echelons, at the distinguished few, they could scarcely be so seen when directed at anyone. Yet that is what Suetonius appears to say, and he almost certainly saw the decree. There is an answer, and it is to be found in the juristic texts *de famosis libellis*, but first let us define what it is we are looking for. On the strength of what Suetonius and Dio have told us, we hope to find evidence of a *senatus consultum* with the following characteristics: it will not deal with defamatory publication as a whole, but only with a special type, pseudonymous or anonymous publication;[69] it will not deal with all types of defamatory instrument, but only with *libelli aut carmina;* the test of liability will be publication *ad infamiam cuiuspiam;* and rewards will be offered to informers. In addition, we hope to uncover evidence to explain the connection between this decree and the decree concerned with Tacitus' *inlustres*.

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[67] So Sherwin-White, 763 ff. Contra W. Otto, ‚Zur Lebensgeschichte des j. Plinius', *SB Bayer. Akad. Wiss.* 10 (1919), 44 ff.; Bauman, *Tiberius* 422 ff. Cf. *Dig.* 48.2.8. The rule prohibiting magistrates from being accusers, or indeed from undertaking any activity as counsel, was well known to Pliny and was only neglected by him with the express approval of the senate, and even then with trepidation. Bauman, *Tiberius* loc. cit. We do not know what *provincia* Pliny held as praetor, but if he had been *praetor de repetundis* could he also have been Massa's accuser *de repetundis*?

[68] On the precise legal basis of the charges against Veiento, Claudius Timarchus, Titius Rufus, Senecio and Massa see at n. 82 below.

[69] Suetonius only has the pseudonymous *(sub alieno nomine)* case, and Dio is to a similar effect, but a separate origin for the anonymous *(sine nomine)* case is beyond discovery.

The juristic texts *de famosis libellis* are as follows:

A. Ulpian *ad edictum* 56 *Dig.* 47.10.5.9: Si quis librum ad infamiam alicuius pertinentem scripserit composuerit ediderit dolove malo fecerit, quo quid eorum fieret, etiamsi alterius nomine ediderit vel sine nomine, uti de ea re agere liceret et, si condemnatus sit qui id fecit, intestabilis ex lege esse iubetur.

B. Ib. 47.10.5.10: Eadem poena ex senatus consulto tenetur etiam is, qui ἐπιγράμματα aliudve quid sine scriptura in notam aliquorum produxerit: item qui emendum vendendum curaverit.

C. Ib. 47.10.5.11: Et ei, qui indicasset, sive liber sive servus sit, pro modo substantiae accusatae personae aestimatione iudicis praemium constituitur, servo forsitan et libertate praestanda. quid enim si publica utilitas ex hoc emergit?

D. Paul *ad edictum* 55 *Dig.* 47.10.6: Quod senatus consultum necessarium est, cum nomen adiectum non est eius, in quem factum est; tunc ei, quia difficilis probatio est, voluit senatus publica quaestione rem vindicari. ceterum si nomen adiectum sit, et iure communi iniuriarum agi poterit; nec enim prohibendus est privato agere iudicio, quod publico iudicio praeiudicatur, quia ad privatam causam pertinet. plane si actum sit publico iudicio, denegandum est privatum; similiter ex diverso.

E. Ulpian *ad Sabinum* 1 *Dig.* 28.1.18 pr., 1: Is cui lege bonis interdictum est testamentum facere non potest et, si fecerit, ipso iure non valet: quod tamen interdictione vetustius habuerit testamentum, hoc valebit. merito ergo nec testis ad testamentum adhiberi poterit, cum neque testamenti factionem habeat. Si quis ob carmen famosum damnetur, senatus consulto expressum est, ut intestabilis sit: ergo nec testamentum facere poterit nec ad testamentum adhiberi.

F. *PS* 5.4.15: Qui carmen famosum in iniuriam alicuius vel alia quaelibet cantica, quo agnosci possit, composuerit, ex auctoritate amplissimi ordinis in insulam deportatur; interest enim publicae disciplinae opinionem uniuscuiusque a turpi carminis infamia vindicare.

G. Ib. 5.4.16: Psalterium, quod vulgo canticum dicitur, in alterius infamiam compositum et publice cantatum tam in eos qui hoc cantaverint quam in eos qui composuerint, extra ordinem vindicatur: eo acrius, si personae dignitas ab hac iniuria defendenda sit.

H. Ib. 5.4.17: In eos auctores, qui famosos libellos in contumeliam alterius proposuerint, extra ordinem usque ad relegationem insulae vindicatur.

J. Gaius 3.220: Iniuria autem committitur ... si quis ad infamiam alicuius libellum aut carmen scripserit.

K. *Inst.* 4.4.1: Iniuria autem ... scripserit composuerit ediderit dolove malo fecerit, quo quid eorum fieret.

L. Arcadius Charisius *lib. sing. de testibus Dig.* 22.5.21 pr.: Ob carmen famosum damnatus intestabilis fit.

M. *Dig.* 47.10.15.27, 29. *PS* 5.4.1.

N. *CTh* 9.34; *CJ* 9.36.

The first significant point about these passages is that a *senatus consultum* is attested by B, C (clearly following on B), D, E and F, but not by any other passage. It is, however, almost certain that a *senatus consultum* is hidden somewhere in A.[70] This clause contemplates two types of defamatory writing, the overt type in which the identity of the writer is not concealed *(si quis ... fieret)* and the covert type in which the writer is either pseudonymous or anonymous *(etiamsi ... nomine).* But the *etiamsi ... nomine* clause is anomalous, both by its position and by reason of *etiamsi* itself. Roman legal draftsmen were not afraid of voluminous clauses, and there was no need to take a fresh breath with *etiamsi:* if the overt and covert cases had originated together, *suo alteriusve nomine vel sine nomine* after *pertinentem* should have been easy enough. And why *etiamsi*? It is argumentative, the legislator's answer to a defendant who had successfully pleaded that he had not published under his own name. This clause is what remains of a *senatus consultum* cited by Ulpian with his usual meticulous care but cut down later and injected into the overt case in such a way as to throw the syntax out of alignment. *Etiamsi ... nomine* either reflects a *senatus consultum* which extended the *lex Cornelia de iniuriis*[71] long before the troubles

[70] Cf. Levy, 1.109, following Lenel, *Palingenesia* 2.768 n. 1. But the scope of Levy's *s. c.* is too wide. See below.

[71] On this as the *lex* in question see Levy, 1.109; Smith, 173; Bauman, *CM* 254 and n. 30; Medicus, *Kl. P.* 3.620. Mommsen, *Strafr* 800 n. 3 prefers the XII Tables, on the strength of *Tab.* viii 1b, 22 (*FIRA* 1.52, 62), but the two rules are probably not connected, since the XII Tables penalty for defamation is capital. Cf. Bauman, loc. cit. Also, the *uti de ea re agere liceret* of A points to the *actio legis Corneliae,* not to the criminal sanction of the XII Tables. When a special *iudicium publicum* was created under the *lex Cornelia* (at nn. 85–92 below) the penalty was still not capital. See also nn. 72, 80.

of A. D. 6–8 (there was the best part of a century between Sulla and the last years of Augustus), or – which seems more likely – it is a fugitive from the *senatus consultum* of B, C and D.[72]

Besides restricting itself to the covert libeller, the *senatus consultum* also limited its scope so far as the defamatory instrument was concerned. This instrument is defined in B as ἐπιγράμματα *aliudve quid sine scriptura*, and in E and F (after the intervention of an editorial hand) as *carmen famosum*. At first sight this indicates a discrepancy between these texts and Suetonius, but in fact ἐπιγράμματα *aliudve quid sine scriptura* is Suetonius' *libelli aut carmina*. The ἐπίγραμμα was ‚a short poem, an epigram',[73] but it was also ‚a criminal charge, as written down on the charge-sheet'.[74] And that is also what the *libellus* was in one of its meanings: the *libellus inscriptionis*, the indictment lodged by the accuser in the preliminary stages of a case.[75] The *famosus libellus* is thus the defamatory indictment, the false charge, and in essence that is what it always is: an unlawful accusation of improper conduct. The ἐπίγραμμα *in notam aliquorum* is the *famosus libellus*, and the one word is thus seen to cover both the *carmen* and the *libellus*[76] in B. But then something has to be done about *sine scriptura*. Mommsen's reading was *sine ⟨nominis⟩ scriptura*, and it must be right. How could an ἐπίγραμμα, ‚a writing upon', be *sine scriptura*?

It is not clear why the *senatus consultum* used the Greek. J, K and Suetonius suggest that *libellum (-os) aut carmen (-ina)* was technically correct, and yet the very uniqueness of ἐπιγράμματα enhances its credibility: the easy way out for a later hand would have been *carmen* (which is in fact what happened to the original Ulpian in E). Perhaps the senate tried to cover all possibilities with *libellos aut carmina vel* ἐπιγράμματα *aliudve quid sine nominis scriptura*.

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[72] Smith, 174 f. holds that overt verbal injury was dealt with by the *lex Cornelia* itself and the covert case by subsequent *s. c.*, thus postulating only one *s. c.* in all. Cf., with modifications, Bauman, *CM* 256 f. Some would have it, however, that the *lex Cornelia* was exclusively confined to the types of physical assault attested by *Dig.* 47.10.5 pr., namely *pulsatus verberatusve domusve eius vi introita*. So, but without proper consideration of the implications, J. Crook, *Law and Life of Rome*, London, 1967, 252 f., 330 nn. The proof is very simple: if interpretation as between *pulsatus* and *verberatus* was not possible, still less was it possible between the *pulsatus ... introita* clause and defamation. See also n. 80.

[73] *LSJ* s. v.

[74] This is the correct meaning in Arist. *Rh.* 1374 a.1, and not the ‚title or label of a criminal charge' of *LSJ* s. v.

[75] Cf. *Dig.* 48.2.3 pr. For other meanings see Rein, 378 ff.; Ernout & Meillet, *Dict. Etym.*[4] s. v.; Smith, 174.

[76] For the view that the two terms were interchangeable see Rein, 378; Levy, 1.108 ff. Cf. perhaps Medicus, *Kl. P.* 3.619 f. Contra Smith, 174.

We now have agreement between Suetonius and the jurists on a decree of the senate restricted to covert libellers who operated through *libelli aut carmina*, and a further requirement, the rewards to informers attested by Dio, is supplied by C. That leaves Suetonius' *ad infamiam cuiuspiam*, together with two matters which he does not raise but which are prominent in the jurists – the question of penalty and the case, postulated by D and F, of the type of victim who is not named in the libel but is able to be recognised. These three factors are the crucial ones, and their elucidation will take us a long way towards identifying the measure by which Augustus created the crime of verbal treason.

5

Suetonius' *ad infamiam cuiuspiam* as the test of the defamatory nature of a publication evokes an equivocal response from the juristic texts. It finds an echo in *ad infamiam alicuius* or the like in most of the passages, but not in B. There the test is *in notam aliquorum*, which is a normal variant as far as *infamia-nota* is concerned, but a most abnormal one as far as *alicuius-aliquorum* is concerned: *alicuius* postulates the case of general application (‚anyone'), but *aliquorum* is restricted in scope (‚certain ones'). Two of the literary sources reflect *in notam aliquorum*. Dio, whose terminological fidelity we have already had occasion to notice, has ἐφ' ὕβρει τινῶν – not in his account of the abortive investigation of A. D. 6, but in connection with the proceedings that he dates to A. D. 12.[77] And Tacitus, as already observed, has *inlustres diffamaverat*. We can already glimpse an explanation for the discrepancy. The general case, the case protecting the reputations of all and sundry, is what one would expect to find in the *lex Cornelia de iniuriis;* and the special case, the case of the privileged few, is appropriate to the *lex Julia maiestatis*. We might therefore begin to think of two stages in the suppression of covert pamphleteering: its subsumption under the *lex Cornelia de iniuriis* in A. D. 6, and its subsumption under the *lex Julia maiestatis* in A. D. 8. But before this can be pressed there are some extraordinarily obdurate difficulties to be overcome.

The juristic texts exhibit a wide range of penalties. In A it is *intestabilis esse*, and the same penalty is attested in B as having been applied by the *senatus consultum* which dealt with covert pamphleteering; and E and L are to the same effect. But F has quite a different penalty – *deportatio in insulam* under the authority of a *senatus consultum*. In G the penalty is *extra ordinem*, and in H it

[77] Cf. at n. 20.

is *extra ordinem usque ad relegationem insulae;* it may be supposed that G is a shortened version of H.

Our first concern is with the penalty of *intestabilis esse.* This was not the penalty for *maiestas,*[78] and it is also not the same as the *infamia* that usually flowed from condemnations under the *lex Cornelia de iniuriis.*[79] But we have it from A that the *lex Cornelia* did prescribe it as the penalty for overt defamation *(intestabilis ex lege esse iubetur),*[80] and B attests its later extension to covert pamphleteering by *senatus consultum.* There is thus no difficulty with *intestabilis esse* as far as A and B are concerned, but when it is considered in relation to D an acute problem appears.

Passage D lays down a special provision of the *senatus consultum* which dealt with covert pamphleteering. It says that when the person at whom the libellous attack is directed is not named in the pamphlet *(cum nomen adiectum non est eius, in quem factum est* – cf. F, *quo agnosci possit),* the *senatus consultum* makes a *publica quaestio, publicum iudicium* his mandatory and only remedy; but if he is named the praetorian *actio aestimatoria* also lies. The reason given is *quia difficilis probatio est,* which is a reference to the insuperable dilemma created by the personal nature of the *actio legis Corneliae*[81]: the unnamed victim can never bring that action, because the issue as to whether the defamation was aimed at him, and therefore as to whether he has *locus standi* to bring the action, can only be decided by a trial. The only way to break out of this perfectly circular situation is through the *publicum iudicium,* in which any member of the public is a competent accuser, irrespective of whether or not he has any personal interest in the matter. This, of course, may be exactly the position of Fabricius Veiento's *patres et sacerdotes,* unless they were individually named in his *codicilli,* and also of the senators attacked by Claudius Timarchus and Titius Rufus; the same goes for Baebius Massa, if Senecio did not name any names when he made his approach to the consuls, and it applies with particular force to Pliny, whose

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[78] So Sherwin-White, *Gnomon* 41 (1969), 291, reviewing Bauman, *CM.* This point was a factor in the writer's decision to undertake the re-examination in the present chapter.

[79] Cf. Mommsen, *Strafr* 805 n. 2; Buckland, 592.

[80] Levy, 1.109 brackets *ex lege,* but erroneously. Once *etiamsi ... nomine* is a later addition, a clause in the original *lex* prescribing *intestabilis esse* for overt libels becomes plainly visible. Krüger reads [ex lege esse] ⟨esse ea lege⟩. On *intestabilis esse* in general see Greenidge, *Infamia* 168 ff.; Mommsen, *Strafr* 403 n. 3, 990 ff.; L. Wenger, *Institutes of the Roman Law of Civil Procedure,* tr. O. H. Fisk, New York, 1940, 18 n. 30; V. Arangio-Ruiz, Istituzioni di Diritto Romano, Naples, 1952, 373; Levy, 1.109, 2.506 n. 492; Buckland, 92, 288 and n. 4; Kaser, 87, 494. See also *FIRA* 1.62 with nn.

[81] Cf. Avonzo, *Iudicium* 175.

complaint was precisely that he had not been named in Massa's *libellus inscriptionis.*[82]

So far so good, but which of the *iudicia publica* was it? If the search has to be confined to the *iudicia publica* of *Dig.* 48.4–15 (cf. ib. 48.1.1) the only suitable candidate is the *quaestio maiestatis,*[83] for the *iudicium legis Corneliae* is not included in that list. But, always bearing in mind that the *senatus consultum* which laid down the special rule for the unnamed victim also applied the penalty of *intestabilis esse,* we are in a position of perfect deadlock, for we have the *senatus consultum* doggedly maintaining that the charge is *lege Julia maiestatis* but the penalty is not. There are other objections to the employment of the *lex maiestatis* in this matter. If *maiestas populi Romani* was held to be diminished whenever *aliquis* was libelled without being named, the *quaestio maiestatis,* far from having fallen into disuse fairly early in the imperial period,[84] would have been one of the most flourishing of the *quaestiones perpetuae.* Morever – and this is the decisive point –, how did unnamed victims vindicate their reputations during the periods when the *crimen maiestatis* was in abeyance?

The solution is a *publicum iudicium* under the *lex Cornelia de iniuriis* rather than under the *lex Julia maiestatis.* It will be a process that had moved some distance away from the original conception of the *actio legis Corneliae,* in as much as the personal right of action will have given way to a right of public accusation, and the recuperatory function[85] will have been replaced by a purely criminal sanction. The origins of this *iudicium* can be modest enough, for the only form of *iniuria* that it need be concerned with is the *de famosis libellis* category. All it need do, in other words, is to relieve Aulus Agerius of the difficult onus of proving *maiestas p. R. minuta* every time he is attacked by an enemy who fails to name either his victim or himself.

A *publicum iudicium* under the *lex Cornelia* is plainly visible in the later empire. The emperors repeatedly harp on the anonymous defamer and the harm that he does to members of the public in general, and they repeatedly enjoin that he be sought out and punished; there is talk of *salus publica;* the penalties are capital; and the destruction of offensive literature is a duty imposed on

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[82] The doctrine of the unnamed victim was destined to play a most important part in the evolution of treasonable *iniuria.* See e. g. at n. 82; ch. IV at nn. 190–2; ch. V at nn. 94–102; ch. VI at nn. 25–43, 178–86.

[83] Cf. Avonzo, Iudicium, 175.

[84] Kunkel, *RE* 24.776; Bauman, Q. *Adult.* 68.

[85] The action normally lay for the recovery of compensation. Mommsen, *Strafr* 193 n. 1, 344 n. 1, 804 f.; Kunkel, *Untersuchungen z. Entwicklung d. röm. Kriminalverfahrens in vorsullanischer Zeit,* Munich, 1962, 51.

every finder.[86] This is a purely criminal court, but it is not a *maiestas* court. The compilers of both Codes allocated their material to the rubric *De Famosis Libellis*,[87] and as they do not always agree on rubrics[88] this is good evidence for the non-*maiestas* character of this court.[89]

The question is, however, whether such a court can be postulated for the early Principate. There is certainly evidence to show that the *actio legis Corneliae* retained its private character down to the Severan period,[90] but the whole point about the *de famosis libellis* category is that a sharp distinction is consistently drawn between it and other forms of *iniuria*. For example, *Codex Justinianus* has separate rubrics, *De Iniuriis* 9.35 and *De Famosis Libellis* 9.36, and the segregation of covert libels is so complete that even other forms of verbal injury, overt defamation and *convicium*, are allocated to *De Iniuriis*.[91] The distinction is preserved in the title of *Dig.* 47.10, *De Iniuriis et Famosis Libellis*. Moreover, *CJ* 9.35 *De Iniuriis* includes constitutions stressing the private character of the *actio iniuriarum*,[92] but there are no such constitutions in 9.36 *De Famosis Libellis;* and the Theodosian *De Famosis Libellis*, *CTh* 9.34, similarly has no *privata causa* decrees. Another important piece of evidence is the *si quis ad infamiam alicuius ... fieret* which appears in full in the *Institutes* and in summarised form in Gaius (K, J). This passage is couched in almost the exact words of Ulpian in A *(scripserit composuerit ediderit dolove malo fecerit, quo quid eorum fieret),* but only in respect of the overt case; where Ulpian then turns to the covert *(etiamsi ... nomine)* case, Justinian breaks off. This strengthens our view that *etiamsi ... nomine* is a later addition – a category which was never recuperatory,

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[86] *CTh* 9.34.1–4, 7, 9–10, *CJ* 9.36.2; *CTh* 9.34.7, *CJ* 9.36.2.2; *CTh* 9.34.10, *CJ* 9.36.2.3; *CTh* 9.34.3, 5, 9, 10; *CJ* 9.36.1, 2.1.

[87] Of the ten constitutions in *CTh* 9.34, seven are expressly concerned only with covert libels, and the rest (9.34.2, 5, 8) were probably similarly restricted. *CJ* 9.36.1, an excerpt from a Greek constitution, provides for both overt and covert cases, but 9.36.2 deals only with the covert case.

[88] Cf. Bauman, *Lex Quisquis* 54.

[89] The position is not altered by *salus publica* in these constitutions, for *publica utilitas* is found in what is obviously the process *lege Cornelia* even in an earlier period. See Paul *Dig.* 3.3.42.1 (overlooked by Levy, 1.109 n. 69); *PS* 5.4.15 (G). Cf. *Dig.* 47.10.5.11 (C).

[90] Mommsen, *Strafr* 804 n. 1. The same period sees the creation of a purely criminal court for *iniuria* as a whole. Ib. 804 and n. 3. Some would date this court even earlier. Buckland, 590 f. But this is not the court that primarily interests us.

[91] *CJ* 9.35.3, 5. Cf. the distinction drawn by Daube, 415 ff. between the edict *Ne quid infamandi causa fiat* and the edicts dealing with *iniuriae* proper and with *convicium* and *adtemptata pudicitia.*

[92] *CJ* 9.35.7, 11.

which contemplated a purely criminal penalty from the start. Linked to this is the fact that the *uti de ea re agere liceret* of A does not appear in B; this, too, is consistent with the supposition that A formulates the overt (and recuperatory) case – except for the displaced *etiamsi ... nomine* clause –, whereas B is part of a *senatus consultum* framing the covert (and purely criminal) case.

6

The *senatus consultum* extending the *lex Cornelia de iniuriis* to covert pamphleteering is the decree of A. D. 6 of Suetonius and Dio, and the feature to which we now turn is the offer of rewards to informers contained in the decree. Dio 55.27.3 merely says that rewards were offered, but Ulpian in C is more specific. He says that a reward is paid to informers, whether free men or slaves, and adds that the slave possibly *(forsitan)* receives his freedom as well. The all-important aspect is the inclusion of the slave. Unmasking a covert libeller was very difficult, and what was envisaged above all was the domestic slave, unheeded but not unheeding, whose attrapation of a chance remark or sight of an ill-concealed document might identify his master as the author of a covert libel. But there was a long-standing custom excluding the evidence of slaves against their masters,[93] and that is where the investigation of A. D. 6 ran into trouble. Dio says that informers began coming forward in response to the offer of rewards but that this merely caused further unrest, and the most likely explanation of this curious statement is that there was a crisis on this very question of the evidence of slaves. The emergency called for such evidence, but this was something which struck at the very roots of the relationship between master and slave, and what made matters worse was the fact that the *senatus consultum* had been approved of by a very small quorum.[94] The enquiry had to be abandoned, and so ended the first attempt to deal with the problem of covert pamphleteering.

The more serious crisis of A. D. 8 precipitated, we may imagine, an even greater outpouring of secret pamphlets, and made a solution to the problem of the slave's evidence even more pressing. It was then that the assistance of the *lex maiestatis* was invoked. It was invoked for the purpose of uncovering the

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[93] Cic. *Pro Deiot.* 3, *Pro Mil.* 59, *Part. Orat.* 118, attributing the rule to *mos maiorum.* Tac. *Ann.* 2.30.3 postulates a *vetus senatus consultum.* Cf. Mommsen, *Strafr* 412 ff., Buckland, *Slavery* 88 ff.

[94] Cf. at n. 15.

covert libeller through the evidence of his slaves, and for no other reason. This is, of course, by no means the only instance of a limited and specialised origin for a major and far-reaching innovation in the field of Roman law. They were a people much given to the casuistic approach, to returning specific *responsa* to specific questions.

In the Republic three exceptions to the customary rule excluding the evidence of slaves against their masters had been recognised, namely in cases of *incestus*,[95] treason[96] and census frauds.[97] Exactly the same three exceptions were given acknowledgement in the Severan period, except that *incestus* was now stated in the broader form of adultery: ‚Quaestionem de servis contra dominos haberi non oportet, exceptis adulteriis criminibus, item fraudati census accusationibus et crimine maiestatis, quod ad salutem principis pertinet.'[98] One might have expected the position in the early Principate to have been in agreement with these terminal points, but scholars have persuaded themselves that at that time the only way to get such evidence in was by a forced sale of the slave to the *actor publicus*.[99] This view is, however, based largely on a misunderstanding of Tacitus,[100] and the true position is that the evidence of slaves against their masters in *maiestas* cases was made formally admissible by Augustus, and it was so made precisely in A. D. 8.

Two Augustan decrees on the subject are known. The first was in 8 B. C.,

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[95] Livy 8.15.7 f.; Cic. *pro Mil.* 59, *Part. Orat.* 118; Val. Max. 6.8.1. In Livy the accused Vestal is ordered *familiam in potestate habere* pending the trial. The reason (*pace* Foster, Loeb ed. ad loc.) was that the slaves' evidence was vital.

[96] *Part. Orat.* loc. cit.: ‚de nostrorum etiam prudentissimorum hominum institutis, qui cum de servis in dominos quaeri noluissent, de incestu tamen, et coniuratione quae facta me consule est, quaerendum putaverunt.' Rackham's bracketing of ‚et ... est' is unnecessary. That there were evidential relaxations in 63 B. C. is also shown by the ‚Julia mulier' who gave evidence against the Catilinarians. *Dig.* 48.4.8.

[97] App. *B. C.* 4.32: The triumvirs prescribed fines for false returns to the census required from 1400 women, and rewards to informers, both free men and slaves. Ib. 4.34: A levy was imposed on men on the same conditions.

[98] *CJ* 9.41.1 pr. This is not inconsistent with the late origin for the slave's right of accusation postulated by De Dominicis, ‚Intorno al carattere post-classico della l. 7.2 Dig. ad legem Juliam Maiestatis XLVIII, 4', *Atti del Reale Istituto Veneto di Scienze, Lettere ed Arti* XCII (1932–33), 1191 ff. As De Dominicis himself points out, o. c. 1198 and n. 2, there is a difference between giving evidence and being an accuser. There is no cause for alarm in ‚quod ad salutem principis pertinet'. The full Severan justification is given in *PS Leid.* 5.10 f.: ‚salus enim principis et status rei publicae per omnes tuendus est: ideoque servi et in dominos rogantur.'

[99] So Mommsen, *Strafr* 414; Buckland, *Slavery* 88; Serrao, 128; Koestermann, *TA* 1.304. For a good discussion of the whole question see Avonzo, *Senato* 115 ff.

[100] Esp. Tac. *Ann.* 2.30.3, on which see ch. III at nn. 43–9.

when, according to Dio, it was laid down that where the evidence of a slave was required against his master, the slave was to be publicly sold, so that, being now the property of someone other than the accused, he could be examined against the latter; this, adds Dio, was considered by some to have abolished the law,[101] but others justified it on the grounds that immunity from such evidence was being used as a cover for plots against Augustus and the magistrates.[102] The grounds of justification make it certain that this decree was limited to charges of *maiestas*, and of course to Republican categories of that *crimen*, and it may have been inspired by the conspiracies of 9 B. C.[103] We may also perhaps think that the limitation to *maiestas* was one of the stumbling-blocks in A. D. 6.

The decree of 8 B. C. marks the first formal solution to the problem of the evidence of slaves of *maiestatis rei*. It was only an indirect solution, in the shape of forced sales to the *actor publicus*, but in cases other than *maiestas*, adultery and census frauds it was destined to have a long currency.[104] As far as at least *maiestas*[105] was concerned, however, it was, in A. D. 8, abandoned in favour of a direct solution. The measure by which this was brought about originated in an

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[101] ὁ νόμος ... καταλύεσθαι. Dio presumably means the *vetus senatus consultum* referred to in Tac. *Ann.* 2.30.3.

[102] Dio 55.5.4.

[103] Cf. Volkmann, 85; Avonzo, *Senato* 115.

[104] At some time or other the sale to the *actor publicus* became the recognised way of giving the slave the freedom that he had been promised as a reward for his information. Cf. Ulpian *de adulteriis Dig.* 48.5.28 ff.: ‚ratio autem publicandorum servorum ea est, ut sine ullo metu verum dicant et ne, dum timeant se in reorum potestatem regressuros, obdurent in quaestione. non tamen prius publicantur, quam quaestio de illis habita fuerit. sed et si negaverint, nihilo minus publicantur: ratio enim adhuc eadem est, ne, dum hi sperant se in potestatem dominorum reversuros, si negaverint, spe meriti collocandi in mendacio perseverent. sed et servi accusatoris, si de his quaestio habita sit, publicantur: eius enim servi ne mentiantur, merito a dominio eius recedunt. extranei vero non habent cui gratificentur.' The slave, as Ulpian says, was not transferred to the *actor publicus* until after the *quaestio*, which militates severely against the operation being a circumvention. And we may safely infer that the *actor publicus* manumitted him immediately. Rogers, *Trials* 16 ff. deduces from this passage that a sale to the *actor publicus* was never a circumvention, but that is putting it too widely. Avonzo, *Senato* 116 n. 174 considers that such a sale was always a circumvention, but does not notice this passage. As for the date of the procedure described by Ulpian, it must be at least as far back as the institution of rewards to slaves, for how else was the slave to be given his reward? The accused will certainly not have co-operated. Sulpicius Rufus' slave was manumitted in 88 B. C., and there is no reason to think that Sulla consulted Sulpicius' heir. Livy *Ep.* 77; Val. Max. 6.5.7.

[105] Adultery was not put on the same footing until A. D. 20. Cf. ch. VII at nn. 5–18.

edict of Augustus, the text of which was most opportunely preserved by Paul in his *de adulteriis:*

> Edictum divi Augusti, quod proposuit Vibio Habito et Lucio Aproniano consulibus, in hunc modum exstat: „Quaestiones neque semper in omni causa et persona desiderari debere arbitror, et, *cum capitalia et atrociora maleficia non aliter explorari et investigari possunt quam per servorum quaestiones, efficacissimas eas esse ad requirendam veritatem existimo et habendas censeo.*" [106]

This vital document falls squarely within the period of the first trials for verbal treason, it is aimed at exactly the sort of problem posed by the covert libel (meaning by this the cases of both the nameless author and the unnamed victim), and it plainly indicates the abandonment of subterfuge, within the limits laid down, and the direct admission of the slave's evidence *in caput domini.* The scope of the new rule is carefully defined: it will not apply to all cases in which there are difficulties of proof *(neque semper ... arbitror),* and hence not to *aliquis;* its sphere will be *capitalia et atrociora maleficia.*[107] The effect of this decree is to abstract a special form of *iniuria,* namely that form of covert pamphleteering which qualifies as *iniuria atrox ex persona* by reason of the status of the persons against whom it is directed (cf. *atrociora maleficia, neque ... in omni persona*), from the *senatus consultum* of A. D. 6 and to elevate the form so abstracted to *maiestas* – to declare, in other words, that henceforth covert pamphlets *in notam aliquorum* will be deemed to diminish the *maiestas* of the Roman people.[108]

The next question is whether the terms of Augustus' edict were incorporated in a *senatus consultum.* The concluding *et habendas censeo* of the edict suggests that Augustus may have been proposing rather than laying down the law,[109]

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[106] *Dig.* 48.18.8 pr. This and one other Augustan decree are the only constitutions prior to Trajan to have been preserved in their *ipsissima verba,* at least in the extant fragments of the classical jurists. Cf. Gualandi, 1.1–17. There are, however, survivals in other sources. Cf. De Francisci, ‚Per la Storia della Legislazione Imperiale durante il Principato', *BIDR* 70 (1967), 187 ff. at 192 f.

[107] Scholars tend to focus on the fact that the edict cut down the torture of slaves. So Levy, 2.374 f.; Volkmann, 85 n. 3. But this humane result was only incidental (especially in A. D. 8): slaves could not testify at all except under torture (cf. Buckland, *Slavery* 87), and therefore by keeping *servorum quaestiones* within defined limits torture and admissibility were simultaneously restricted.

[108] On *iniuria atrox* in general see Buckland, 592. And, on *capitalia et atrociora maleficia,* Levy 2.374 f.

[109] Cf. Mommsen, *Staatsr* 2.905 n. 1.

and the senate certainly had a traditional interest in the evidence of slaves.[110] An even more cogent argument can be deduced from the reference in Passage F to a penalty of *deportatio in insulam* which is imposed on the authority of a *senatus consultum* and which is, to judge by *quo agnosci possit*, specifically connected with covert libels. This penalty is in marked contrast with the *extra ordinem usque ad relegationem insulae* of G and H, and the discrepancy is not accidental. *Pauli Sententiae*, from which these three passages are drawn, does not falsify its documentation: when a penalty has moved beyond what was originally authorised it does not attempt to attribute it to an enabling ordinance, and when it does make such an attribution it may safely be concluded that that is what Paul said. Here the *extra ordinem* cases are the contemporary versions of what was originally a penalty of *intestabilis esse* under the *lex Cornelia* (not under a *senatus consultum* – G and H do not deal with the covert defamer), and the *deportatio in insulam* is the original penalty under some *senatus consultum* or other. Now, we recall that the new regulations for exiles attested by Dio for A. D. 12 included an intensification of penalty to *deportatio in insulam*, and although Dio does not say that this was by *senatus consultum*, it is a fair inference,[111] especially in view of the senate's known part in the deportation of Agrippa Postumus. The measure described by Dio properly belongs to A. D. 8, and it is highly probable that he and *Pauli Sententiae* are referring to the same decree – a decree of the senate issued in the same year as Augustus' edict, and creating the necessary category of *capitalia et atrociora maleficia* contemplated by the edict by subsuming *libellos aut carmina vel* ἐπιγράμματα *aliudve quid sine nominis scriptura in notam aliquorum* under the *lex Julia maiestatis*. The inroad into the prerogatives of the *dominus* was now placed beyond recall, but it was hoped to keep it within bounds by the restricted ambit of *in notam aliquorum* and by the special onus of proof demanded by *maiestas minuta*.[112]

The legislation of A. D. 8 had a profound effect on the juristic texts *de famosis libellis*. This is exemplified by the Ulpian fragments, in which the *in notam aliquorum* of B contradicts the *ad infamiam alicuius* of A and is quite out of

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[110] Cf. for example the *vetus s. c.* of Tac. *Ann.* 2.30.3.

[111] Dio 56.27.1, 4 makes Augustus personally the author of the book-burning decrees, the admission of *equites* to the tribunate (a doublet of 54.30.2?), the proceedings *de famosis libellis* and the new regulations for exiles. But the book-burning decrees and the defamation verdicts certainly emanated from the senate, and the same can be postulated for the regulations for exiles.

[112] On this onus see Bauman, *CM* pass. An accuser who elected to proceed under the *lex maiestatis* ran a greater risk of failing and incurring a charge of *calumnia* than under any other law. Cf. Bauman, 248 ff.

place in what purports to be a generally available remedy under the *lex Cornelia;* it is also exemplified by F, since that passage proves that Paul discussed the *maiestas* counterpart to the Cornelian remedy in the section of his *ad edictum* dealing with *iniuria.* Contamination of the legislation of A. D. 6 by that of A. D. 8 is a safe assumption, and in this regard we recall the hesitant *forsitan* with which C avers that the servile informer may be rewarded with manumission. This is not the language of the legislation of A. D. 8: when the charge was *maiestas* it was certain that the evidence would be admitted and that the witness would in due course receive his freedom.[113] It is the language of someone who is fully aware of the grave difficulties generated by the attempt to use the evidence of slaves against their masters in A. D. 6.

7

The date and manner of Augustus' creation of the crime of verbal treason can now be accounted reasonably secure, but it will no doubt be objected that the rôle of a covert pamphleteer is somewhat out of character for Cassius Severus, whom one generally thinks of as one of the most overt and uncompromising vilifiers of the ancient world. A moment's reflection will show, however, that there is no problem here. Tacitus says that he was charged in connection with *procacibus scriptis,* and this already takes us away from the extensive repertoire of oral insults on which his reputation was built,[114] so that it simply becomes a question of whether his new venture into the field of written defamation was overt or covert. Tacitus leaves us in no doubt as to which he thinks it was. He turns from Augustus' proceedings against Cassius to the praetor's question to Tiberius concerning *iudicia maiestatis* and the emperor's well-known *exercendas leges esse* in reply, and adds by way of explanation that Tiberius *too* had been exasperated by covert pamphlets – ‚hunc quoque asperavere carmina incertis auctoribus vulgata'.[115] In this context it is extremely likely that the writings of Cassius on which Augustus took action were also *carmina incertis auctoribus vulgata.* If any corroboration is needed, Dio's assertion that the scurrilous pamphlets of A. D. 12 (= A. D. 8) had to be *sought out*[116] should suffice, for that search was part of the same proceedings as the trial of Cassius.

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[113] Cf. the discussion of *Dig.* 48.5.28 ff. in n. 104.

[114] Fuhrmann, *Kl. P.* 1.1076; Bauman, *CM* 257 ff.

[115] Tac. *Ann.* 1.72.5.

[116] Dio 56.27.1: ζήτησιν αὐτῶν ἐποιήσατο. Cf. Suet. *ne requisitis quidem auctoribus.*

Cassius' trial raises another difficulty. When he was tried (by the senate[117]) in A. D. 8 he was sentenced only to *relegatio*, the milder form of exile,[118] and it was only in A. D. 24 that his continued attacks from his place of exile on Crete obliged the senate to reconsider his case and to sentence him to confiscation, interdiction and deportation.[119] The sentence of A. D. 8 was well below the statutory penalty for *maiestas*, and the question is whether this casts any doubt on Tacitus' assertion that Augustus had Cassius tried for *maiestas*. The answer is that the senate had power to mitigate or intensify statutory penalties,[120] and there was good reason for it to exercise the power of mitigation even in the very first trial under the new dispensation. The proceedings of A. D. 8 were designed not so much to inflict punishment on the authors of the pamphlets as to discover the pamphlets themselves and destroy them: so much was this the case that although *all* the offending literature was sought out and destroyed, only *some* of the authors were punished.[121] In order to gain access to the evidence of slaves there had to be a full subsumption of defamation under the *lex maiestatis*, including the formal adoption of the full penalties of that *lex*, but once the slaves had been interrogated and the offending literature discovered and destroyed, the actual punishment could be regulated according to the gravity of the offence. Similar considerations would apply to Fabricius Veiento, for his punishment was expulsion from Italy, and to Claudius Timarchus, although Titius Rufus' suicide suggests that a more serious penalty awaited him.[122]

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[117] Tac. *Ann.* 4.21.5. Cf. n. 118.

[118] *Relegatio* cannot be said to have been completely clarified, despite the searching enquiries of Brasiello, 292 ff. It clearly involved expulsion from Rome, possibly for a limited period and certainly without loss of citizenship or property, but when Brasiello sees both it and *deportatio* as acts of *coercitio* rather than as legal sentences he raises more problems than he solves. Even the senate imposed *relegatio* (cf. Brasiello, 293), and at least in Cassius Severus' case it did so expressly as a court (cf. Bleicken, 35): ‚ut iudicio iurati senatus Cretam amoveretur effecerat.' Tac. Ann. 4.21.5. Cf. n. 119. See also, most recently, Garnsey, 111–22.

[119] Tac. loc. cit.: ‚bonis exutus, interdicto igni atque aqua, saxo Seripho consenuit.' This conjunction of interdiction and deportation is precisely what Dio says was legislated for in A. D. 12 (= 8).

[120] Plin. *Ep.* 4.9.17: ‚cum putaret licere senatui, sicut licet, et mitigare leges et intendere.' Cf. Mommsen, *Strafr* 254, 1039; Avonzo, *Senato* 140 f.; Brunt, 201 and n. 34a. Contra Sherwin-White, 163, discussing Plin. *Ep.* 2.11.4. But this passage merely proves contention in a case of *repetundae*. Sherwin-White does not fare any better with Tac. *Ann.* 3.68, 4.20 or 14.45. The last-mentioned in particular has the opposite effect to that assumed by Sherwin-White.

[121] Cf. n. 42 i. f.

[122] See also n. 126.

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The legislation of A. D. 8 in no way abolished the *senatus consultum* of A. D. 6. We have Suetonius' assurance that it was destined for future use, and its prominence in the pages of the Severan jurists and later on in the imperial constitutions confirms that it had a long and vigorous career. Its categories supported two parallel rôles, generating either the *iudicium legis Corneliae* or the *iudicium legis Juliae* according as the libel was construed as *ad infamiam alicuius* or *in notam aliquorum*. For the most part the same canons of construction applied, which is precisely what one would expect once the same substantive categories were involved in both *iudicia*. So much was this the case that although the one year's extinctive prescription of the *actio iniuriarum*[123] did not apply to the *crimen maiestatis* (the latter not having been subject to extinctive prescription at all[124]), there was always an uncomfortable feeling that such a limitation, and also the special rule of the *actio iniuriarum* depriving the injured party of his right of action if he did not display instant anger,[125] should logically apply to charges of *maiestas* as well. In this regard one recalls Tacitus' complaints about Tiberius' dissimulation, and it may not be a coincidence that Baebius Massa charged Senecio ‚on the instant' – ‚vixdum conticueramus, et Massa ... postulat'. The close affinity of the two *iudicia* sometimes makes the positive identification of a given case difficult,[126] but the same affinity helped to make the *iudicium legis Corneliae* a substitute for the *crimen maiestatis* during its periods of abeyance.

The investigation that lies ahead will reveal many injurious acts besides covert libels being dealt with as *maiestas*. There will be other types of verbal

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[123] Buckland, 591.

[124] Mommsen, *Strafr* 488 f.

[125] *Dig.* 47.10.11.1: ‚iniuriarum actio ... dissimulatione aboletur. si quis enim iniuriam dereliquerit, hoc est statim passus ad animum suum non revocaverit, postea ex paenitentia remissam iniuriam non poterit recolere.'

[126] The case of Claudius Timarchus is not said by Tacitus to have been for *maiestas*, although the rank of the victims seems to make this secure. Even the *haud dispari crimine* with which the case of Fabricius Veiento is introduced is unfortunate. Normally this allusion to the immediately preceding case of Antistius Sosianus would leave no doubt that this, too, was a charge of *maiestas*, but in view of the parallel action *lege Cornelia* one is left with the uncomfortable feeling that *haud dispari crimine* is just how such an action might have been described. However, it is likely that the good name of a substantial body of senators and priests provoked the greater charge, especially as the evidence of slaves may have been needed to elucidate the *codicilli*. The case of Titius Rufus is securely *maiestas*.

injury, in both the overt written and oral forms, together with desecration of effigies and other real injuries. For none of these, however, will it be possible to identify another clear-cut originating ordinance like the *senatus consultum* of A. D. 6 read with the legislation of A. D. 8. There will be good evidence for some of the legislation on the special subject of asylum, and the omnibus *maiestas* laws attested for Nero and Domitian will be duly considered, to mention only some. But nowhere will anything be uncovered to rival the unique combination of juristic and literary sources, and the almost perfect agreement among those sources, that has been presented in connection with the creation of the crime of verbal treason. The main source from which material was constantly drawn for *iniuria principis* was the *lex Cornelia de iniuriis* and the parallel categories of the praetorian *actio aestimatoria iniuriarum*. It was open to an accuser to argue that any act of *iniuria* was, in the particular circumstances, *atrox ex persona* and should be treated as *maiestas;* and if his argument won acceptance a new category was added to the *lex maiestatis*. The further development of *impietas in principem* after A. D. 8 was consequently the work not so much of the emperor or the senate as of the delators: they excogitated the new ideas, and in a certain sense the emperor or the senate merely acted as a rubber-stamp. Tacitus knew exactly what he was saying when he made the evils of the *quaestio maiestatis* and the evils of the system of delators no more than the opposite sides of the same coin.

III. IMPIETAS IN PRINCIPEM: TWO PRELIMINARY MATTERS

1. The delators and maiestas

In A.D. 21 Ancharius Priscus brought charges *de repetundis* against Caesius Cordus, a former proconsul of Crete. There was also a charge of *maiestas* which, says Tacitus, was at this time the complement of every accusation: ‚Ancharius Priscus Caesium Cordum pro consule Cretae postulaverat repetundis, addito maiestatis crimine, quod tum omnium accusationum complementum erat.'[1] Tacitus' attention is then distracted, but he returns to this case later on with the news that the Cyrenaicans were given a hearing and that Cordus was condemned for extortion on the accusation of Priscus.[2]

Our concern is with the allegation that a charge of *maiestas* was tacked on to every case. Even if this means only ‚in a significant number of cases', why was it done? What was the special virtue of the *crimen maiestatis*?

Pliny dismissed the *crimen maiestatis* as the last resort of those who had no charge at all,[3] which is plainly absurd if taken literally but by no means to be completely disregarded on that account. Suetonius says of Nero that any word or deed for which an accuser was forthcoming fell under the *lex maiestatis*, and of Domitian that property was seized wherever situate and on any charge brought by any accuser, as long as there was an allegation of some word or deed *adversus maiestatem principis*.[4] These may also be exaggerations,[5] but what is it that the sources are trying to say? What was the reason for the delators' apparent predilection for the *crimen maiestatis*? The delator was *dominus litis*. It was he who conducted the preliminary investigation[6] and, if the evidence justified it, initiated a prosecution, selecting for this purpose the *quaestio perpetua*[7] most

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[1] Tac. *Ann.* 3.38.1.

[2] Ib. 3.70.1.

[3] Plin. Pan. 42.1: ‚maiestatis singulare et unicum crimen eorum qui crimine vacarent.'

[4] Suet. *Ner.* 32.2, *Dom.* 12.1.

[5] Cf. ch. VI at nn. 101–14, 202–25.

[6] Which might be most thoroughly organised. Cf. ch. V at n. 61 on T. Sabinus.

[7] Or, where the trial was in the senate, the particular *lex*. The senate carefully preserved the separate identities of the *leges iudiciorum publicorum*. Cf. Bleicken, 53.

appropriate to the offence. But if the sources are to be believed, the charge of *maiestas* did not follow this straightforward course: very often it was not so much a question of bringing the case to the *quaestio maiestatis* as of bringing the *quaestio maiestatis* to the case. Yet the accuser who elected to proceed under the *lex maiestatis* was by no means taking a guaranteed short-cut to success. He was accepting an onus with which he was not saddled by any other *lex* when he undertook to prove that the act in question had not only been committed but had diminished *maiestas p. R.*;[8] this onus greatly increased the chances of his failing in his prosecution and having to face a charge of *calumnia*,[9] and there must have been special compensations to warrant such a risk.

The answer does not lie in the prejudice that a charge of *maiestas* would create in the mind of the court, despite the fervent advocacy of Marsh and Rogers to that effect, nor in the ‚dummy charges' masking ‚more serious charges' to which Rogers in particular was addicted.[10] Koestermann has put forward the interesting suggestion that it was when Tiberius restricted the activities of the delators under the *lex Papia Poppaea* in A. D. 20 that they turned to the *lex maiestatis* as an alternative source of revenue.[11] The trouble is, however, that the Tiberian commission on the *lex Papia Poppaea*[12] looks more like one of the clearances of the trial lists that the emperors carried out from time to time[13] than a reform of substance,[14] and in any event informers were still so active under that *lex* in Nero's day that their premium had to be reduced to a quarter of the accused's property[15] – and therefore to the same level as that occupied by the *maiestas* premium since at least the time of Tiberius.[16] Moreover, Pliny looked back to

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[8] On this double onus see Bauman, *CM* pass. and esp. 54 f.

[9] Cf. ib. 249 f. and, on the special plea of *maiestatem auxi* which often exonerated the accused, ib. 51 ff. and pass.

[10] Marsh, pass.; Rogers, *Trials* pass. For a useful discussion of some of the passages on which Marsh and Rogers relied see Avonzo, *Senato* 89 f.

[11] Koestermann, *Majestät* 84 n. 30.

[12] Tac. *Ann.* 3.28.6 and esp.: ‚exsoluti plerique legis nexus modicum in praesens levamentum fuere.'

[13] Cf. Bauman, *Q. Adult.* 76 ff.

[14] Furneaux, 1.427 and Koestermann, *TA* 1.473 take ‚exsoluti ... nexus' (n. 12) to imply the excision of numerous cases that had crept into the *lex* by interpretation. But Tacitus says that ‚most' obligations were loosened, not merely ‚many', and if this meant the excision of categories the relief would have been more weighty than ‚modicum' and more permanent than ‚in praesens'. The only attested relaxation by Tiberius is the presumption that sexagenarians were incapable of procreation. Suet. *Claud.* 23.1. For a different view of the commission on the *lex Papia Poppaea* see Bleicken, 98 f.

[15] Suet. *Ner.* 10.1: ‚praemia delatorum Papiae legis ad quartas redegit.'

[16] Tac. *Ann.* 4.20.3.

charges under the *lex Papia* and under the *lex maiestatis* as the twin props of Domitian's treasury.[17] Finally, Tacitus does not date the *gravissimum exitium* resulting from the *lex maiestatis* merely from A. D. 20, when the *lex Papia* was revised, but from A. D. 15 in respect of its beginnings and 17 in respect of its first serious inroads.[18]

In any case, it is not as if the *lex Papia* was the only statute to offer inducements of comparable value to the *maiestas* fourth. Special non-pecuniary rewards for accusers *de repetundis* are disclosed in the oldest known legislation on the *iudicia publica*,[19] and pecuniary rewards are attested for at least the *lex Cornelia de sicariis*[20] and arguably for the *quaestiones perpetuae* as a whole.[21] Another possibility, namely the more severe penalties offered by the *lex maiestatis*, is, with the exception of cases of provincial extortion in which the infliction of condign punishment was desired, illusory.[22]

The most likely motive is the fact that the *crimen maiestatis* opened the way to the interrogation of slaves *in caput domini*.[23] In the course of one of his denunciations of informers, Tacitus says that slaves were corrupted against their masters, and cites *contumax etiam adversus tormenta servorum fides* as a

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[17] Plin. *Pan.* 42.1. See further on this passage below. It is true that in the contrast posed by Pliny the *crimen maiestatis* is seen as a greater source of revenue than the *Voconiae et Iuliae leges* (on which see E. Malcovati, *Il Panegirico di Traiano*, Florence, 1949, 40 nn. 1,2), but unless the latter had still been substantial income-earners the contrast would have had no point. See also Plin. *Pan.* 34.1 (on the mass punishment of delators): ‚nulla iam testamenta secura, nullus status certus; non orbitas, non liberi proderant.'

[18] Tac. *Ann.* 1.73.1, 2.50.1.

[19] E. g. the rewards under the *lex Acilia*. *FIRA* 1.101 f.

[20] *Dig.* 29.5.25 pr., 1. Mommsen, *Strafr* 508 and n. 2, 509 and n. 6, 510 dismisses this passage as proving Republican rewards only in subordinate cases, but ‚lege Cornelia cavetur de praemio accusatoris, qui ...' looks very much like the selection of a pertinent example from a number of reward categories.

[21] See Schol. ad Cic. *S. Rosc.* 55, p. 309 St.: ‚restat ut hoc quadruplatione fecerit; nam si accusasset aliquis reum et vicisset, quartem partem bonorum eius accipiebat.' Mommsen, *Strafr* 510 n. 2 rejects this ‚falsche Verbindung mit der Quadruplation', but the whole tenor of Cicero's own remarks points in the same direction. *S. Rosc.* 55–57 and esp. ‚alii (vestrum) canes, qui et latrare et mordere possunt: cibaria vobis praeberi videmus'. For the same simile, also with reference to the delators, cf. Sen. *Ad Marc.* 22.5.

[22] On provincial extortion see ch. IV at nn. 122–59, and on the several *leges* other than the *lex maiestatis* carrying the penalty of interdiction see Levy, 2.345 ff.

[23] Cf. perhaps Mommsen, *Strafr* 542 n. 6: ‚Der Missbrauch der Majestätsklage bezieht sich noch mehr auf die dieser Prozessform eigenen Schärfungen, zum Beispiel die Zulassung der Folter ..., als auf die gesteigerte Strafe.'

noteworthy example of virtue.[24] There is a consistent pattern of abolitions of charges of *maiestas* being accompanied by rigorous action against slaves who had incriminated their masters. Thus, Domitian's reaction against informers included severe measures against such slaves; when Nerva abolished the *crimen maiestatis* he executed slaves who had conspired against their masters and did not allow such persons to incriminate their masters in the future; after the death of Commodus the cry was *servorum subornatores de senatu!;* and when Pertinax abolished charges he absolved those who had been falsely incriminated by their slaves and crucified the slaves.[25] The fact that in 54, during the dormancy of the *lex maiestatis,* a *receptio inter reos* against Carrinas Celer on an accusation brought by his slave was refused[26] also belongs here, and so does Josephus' notice of the fact that under Caligula slaves had been readily believed when they had given false evidence against their masters; moreover, adds Josephus, they had easily gained both their freedom and the informer's reward in return for information about their masters' properties.[27] The most instructive example of all is the passage in Pliny's *Panegyric* on the subject of Trajan's abolition of charges of *maiestas:*

> The *fiscus* and the *aerarium* used to be enriched ... by the *crimen maiestatis,* the sole and unique charge of those who had no charge at all. You have abolished all fear of that *crimen,* relying on grandeur, a quality lacking in none so much as in those who arrogated *maiestas* to themselves. Loyalty has been restored to friends, piety to children and obedience to slaves: they fear, they obey and they know their masters. No longer is it our slaves who are the emperor's friends, but we ourselves, no longer does the *pater patriae* think himself dearer to other men's slaves than to his own citizens. You have delivered everyone from the domestic accuser, and under the single banner of the public safety you have suppressed what was virtually a ser-

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[24] Tac. *Hist.* 1.2 i. f., 1.3.

[25] Dio 67.1.3 f. Ib. 68.1.2. *SHA Vit. Com.* 19.7. Ib. *Vit. Pert.* 9.10.

[26] Tac. *Ann.* 13.10.3: ‚neque recepti sunt inter reos Carrinas Celer senator servo accusante aut ...' We are not called upon here to refute the late origin for the slave's right of accusation postulated by De Dominicis (ch. II n. 98), and are content to take *servo accusante* as meaning that the slave supplied information on which someone duly competent based a *nominis delatio.* See however nn. 27, 29.

[27] Jos. *Ant.* 19.131. The slave-accuser, rather than the slave-informant, crops up again in ib. 19.12 f.: Caligula allowed slaves to bring whatever charges they pleased against their masters; Polydeuces, slave of Claudius, accused Claudius, and Caligula attended court in the hope of seeing his uncle capitally condemned, but was disappointed. It becomes increasingly difficult to maintain that the slave was only an informant, although the latter is in fact all that we need.

> vile war. Thereby you have benefited slaves and masters alike, by giving security to us and virtue to them. You do not wish that act to be praised,[28] and perhaps it should not be; yet it is welcome to those who remember that emperor who suborned slaves to incriminate their masters and explained what charges he was prepared to punish as if they had been included in a proper accusation[29] – a great and unavoidable mischief, and one that everyone had to put up with when they possessed slaves conforming to the emperor's specifications.[30]

This passage speaks for itself. Pliny sees virtually the whole significance of the abolition of charges in its effect on the relationship between master and slave. There are no innocent victims, no torrents of blood, no mourning mothers – nothing but single-minded concentration on what the upper classes believed was the really vicious part of the *maiestas* process.

The crux of the matter is the objective laid down by Augustus' edict of A. D. 8, the establishment through the slave's evidence of facts not readily provable by other means, and in this regard we make two postulates: first, that a would-be accuser in any *iudicium publicum* did not have an absolute right of accusation, but had to meet a minimum standard of proof in order to secure the acceptance of his charge; and second, that until he had such acceptance the *maiestas* accuser could not claim access to the defendant's slaves. The minimum quantum of proof is largely a matter of conjecture. We may, with Greenidge, call it a *prima facie* case;[31] this no doubt raises some danger of importing notions unknown to the Romans, but if reference is made to the model *libellus inscriptionis* for use in adultery cases supplied by Paul it will be seen that the concept of a minimum in criminal cases was indeed understood.[32] Similar rules applied to the other *quaestiones perpetuae*[33] and, *mutatis mutandis,* to the senate.[34] Our second postulate, that there had to be a *receptio inter reos* before access to the

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[28] That is, Trajan's mass punishemt of delators, on which see ch. VIII at n. 10.

[29] ‚Monstrantem crimina quae tamquam delata puniret.' This passage may relieve us of the need to postulate a slave-accuser in the formal sense. What Domitian should be credited with is the creation of a legal fiction: the slave was not recognised as a competent accuser in the formal sense, but his depositions were acted on by the emperor as if he were – no doubt by bringing the charge before the imperial criminal court rather than the senate. A sort of bonitary delatorship had been created.

[30] Plin. *Pan.* 42.

[31] Greenidge, *The Legal Procedure of Cicero's Time,* Oxford, 1901, 463.

[32] *Dig.* 48.2.3 pr., 3.1. Cf. Greenidge, o. c. 465.

[33] *Dig.* 48.2.3 pr.

[34] Avonzo, *Senato* 81 believes that senatorial trials were set in motion by oral charges, following the usual way of initiating senatorial debates, but this view is not compelling.

accused's slaves could be sought, cannot be directly validated but is highly probable, for the obvious corollary to the accused not yet being a technical *reus* is that the case did not yet have a name: there was not yet an adjudicable *crimen maiestatis* on record, and therefore the advantages of that *crimen* could not yet be enjoyed.

The position here postulated can best be illustrated by a hypothetical case. Suppose that D suspects R of a contravention of one of the public criminal *leges*, for example the *lex Cornelia de sicariis*, but does not have the necessary evidence. He knows, however, from covert negotiations with S, a slave of R, that a charge could be brought home if the evidence of S could be adduced. D therefore casts around for an *iniuria* perpetrated by R against anyone whose personality warrants an allegation of *iniuria atrox* – the chances of R having at some time insulted someone of standing are good –, and with this information he readily secures a *receptio inter reos* against R on a charge of *maiestas*. Being now entitled to adduce the evidence of S, he is at large to examine him on the suspected contravention of the *lex Cornelia de sicariis* as well,[35] and to use the information thus elicited to frame an acceptable *libellus inscriptionis* under that *lex*. This was of course only possible in senatorial trials, since the joinder of charges under different *leges* was not normally competent in the *quaestiones perpetuae*,[36] but even with that restriction the possibilities were unlimited. It was even open to an accuser to use *maiestas* to prove *maiestas*, to use evidence of insults to get a process going and then to uncover evidence of, say, a conspiracy through the accused's slaves.

On these terms the *crimen maiestatis* becomes the linchpin in the entire system of criminal justice. The slave's evidence was of great importance in many cases besides treason, adultery and census frauds, but with the exception of those three it was not possible to persuade Roman society to abandon its prejudices. A symbiotic solution was found, whereunder the *lex maiestatis* would, in effect, supply the evidence and the other *lex* would supply the charge. This was the most important advantage of the *crimen maiestatis*, for although adultery and census frauds offered similar facilities they could not hope to compete with the elasticity and eclecticism of the *lex maiestatis*. There were no doubt other

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[35] Cf. ch. VIII at nn. 59–66 on some peculiar rulings of Trajan and Hadrian.

[36] Quint. *Inst. Orat.* 3.10.1. Cf. Mommsen, *Strafr* 379 f. On cumulation *extra ordinem* in a *quaestio perpetua* see Cic. *Inv.* 2.58 f. When Titus abolished *maiestas* and expelled the delators he also discouraged delation for the future by making it unlawful *de eadem re pluribus legibus agi* (Suet. *Tit.* 8.5); this was probably binding on the senate as well as on the *quaestio*, and was prompted at least in part by the non-availability of the special advantage of *maiestas*.

advantages, such as fiscal replenishment and the sense of urgency communicated to a case in which the security of the state was (in theory) always involved, and also the fact that if a charge could not be framed under any other *lex* there was, as Pliny says, always room for it in the *lex maiestatis;* but in the last resort access to the evidence of the accused's slaves was the main reason for the delators' intense concentration on the *crimen maiestatis.*

2. Occult practices and maiestas

The subsumption of occult practices under *maiestas* is often supposed to have occurred at an early stage of the Principate,[37] but in fact the evidence points to a much later date. The first express subsumption is not attested until the mid-fourth century, and even then the association of the two concepts was at best a qualified and limited one. Prior to that, the evidence for most of the first century is decidedly against subsumption, and although from about the time of Domitian the dividing-line appears fragile in places, the balance is still against there having been any formal association until the mid-fourth century.

In the late Republic charges against practitioners of the occult arts were sometimes brought, and were accomodated within the ambit of the public criminal law, but the *lex* enlisted for this purpose was demonstrably not the *lex maiestatis.* This is shown by the case of P. Nigidius Figulus (*pr.* 58 B. C.[38]), who was charged, jointly with Pseudo-Sallust, with practising occult arts.[39] By a fortunate chance it is possible to say that although the charge against Ps.-Sallust was brought before a *quaestio perpetua,* it was not the *quaestio maiestatis.* This is because of the assertion by Ps.-Cicero[40] that Ps.-Sallust was twice brought before a *iudex* but was acquitted by perjured *iudices:* ‚bis iudicis ad subsellia attractus ... ita discessit ut ... iudices peierasse existimarentur.' Here the *iudex* (as opposed to the *iudices* or jurors) is a *iudex quaestionis* presiding over a *quaestio perpetua* in place of the praetor, something which was a feature of

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[37] See esp. G. Luzatto, *Festschr. Lewald,* Basel, 1953, 101; and, with some reservations, Cramer, *Astrology* 254ff. Cf. Furneaux, 1.451; Ciaceri, 260 n. 1; H. Dessau, *Gesch. d. röm. Kaiserzeit,* Berlin, 1926, 2.1.57; Marsh, 111; Rogers, *Trials* 62f.; Kornemann, 139; Koestermann, *Majestät* 100 and n. 66, *TA* 1.514. For a more sceptical view see Mommsen, *Strafr* 407; Bleicken, 53.

[38] Broughton, *MRR* 2.194.

[39] Dio 45.1.4; Ps.-Cic. *In Sall.* 5.14.

[40] Loc. cit.

several *quaestiones perpetuae*, and notably of the *quaestio de sicariis et veneficis*,[41] but which was not a feature of the *quaestio maiestatis*.[42]

Going forward to the early Principate, the case of Libo Drusus in A. D. 16 furnishes clear proof that occult practices were not yet being treated as *maiestas*. The charges against Libo certainly included occult pursuits, in the shape of numerous questions to astrologers of sinister import and the compilation of a *libellus* containing mysterious symbols against the names of the Caesars and senators[43] (not a *libellus ad infamiam*), but these allegations were quite separate from the conspiracy charges which were also raised in the indictment.[44] There are two reasons for saying this. The first is the curious fact that Vibius Serenus, one of Libo's four accusers and the auther of the occult counts in the indictment,[45] was not given a share in the reward distributed amongst the accusers at the conclusion of the case;[46] in other words, where the charges of *maiestas* had succeeded,[47] the wholly severable charges of astrology had not. The other significant factor is the way in which the *libellus* with the mysterious symbols was dealt with in the case. Tacitus says that Libo's slaves were sold to the *actor*

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[41] Cf. Bauman, *Q. Adult.* 77 ff. See also Broughton, *MRR* 2.152 f., 2.4, 2.76, 2.102, 2.162. On the subsumption of magical practices under *venenum* rather than under *maiestas* see Mommsen, *Strafr* 639 ff., 863. Cf. Kleinfeller, *RE* 14.396. See also below.

[42] Jones, 58 f. postulates a *iudex quaestionis* for the *quaestio maiestatis* on the dubious authority of the *Lex Latina Tabulae Bantinae* (*FIRA* 1.82 ff.), but contradicts himself almost immediately by stating that the senate ‚naturally assigned to the praetors the politically important courts: ... *maiestas* ...'. L. Cassius Longinus presided over the *quaestio maiestatis* as praetor in 66 B. C., and Q. Gallius did the same in 65. Ascon. 59 f., 62, 88 C. C. Cosconius was probably *praetor de maiestate* in 63, and so was Cn. Cornelius Lentulus in 59. Cic. *Sull.* 42, *Vat.* 27. C. Memmius held the office in 58. Cic. *Q. f.* 1.2.16, *Vat.* 33; *Schol. Bob.* 150 St. The *quaestio maiestatis* was still a praetorian *provincia* in A. D. 15. Tac. *Ann.* 1.72.4.

[43] Tac. *Ann.* 2.30.2: ‚uni tamen libello manu Libonis nominibus Caesarum aut senatorum (cf. *Fast. Amit.*, n. 44) additas atroces vel occultas notas.'

[44] Tac. *Ann.* 2.27.1: ‚defertur moliri res novas.' Fast. Amit. (Ehrenberg & Jones, 52): ‚fer. ex s. c. q. e. d. nefaria consilia quae de salute Ti. Caes. liberorumque eius et aliorum principum civitatis deq(ue) r. p. inita ab M. Libone erant in senatu convicta sunt.' Cf. Vell. 2.130.3; Sen. *Ep.* 70.10; Suet. *Tib.* 25.1; Dio 57.15.4.

[45] Tac. *Ann.* 2.30.1. Cf. Koestermann, *Majestät* 90 and n. 42.

[46] The reward is in Tac. *Ann.* 2.32.1: ‚bona inter accusatores dividuntur.' This cannot, *pace* Furneaux, 1.321, mean that the whole estate was so divided. There is no parallel for such generosity. The exclusion of Vibius Serenus is in Tac. *Ann.* 4.29.4: ‚post damnatum Libonem missis ad Caesarem litteris exprobaverat suum tantum studium sine fructu fuisse.'

[47] Libo anticipated condemnation by suicide, but the senate proceeded with the case and reached a verdict, including the reward to the accusers. Tac. *Ann.* 2.31, 32.1.

publicus in order to be interrogated on this *libellus*, and criticises Tiberius for having circumvented a *vetus senatus consultum* concerning servile evidence in this way.[48] But if the sequence of events is carefully scrutinised it will be seen that it was precisely because the interrogation related to charges other than *maiestas* that circumvention was resorted to. The sequence is as follows: Vibius Serenus announces that because the accused is undefended the charges will be taken separately *(singillatim);* he tenders evidence of Libo's *libellos vaecordes* and of his questions to astrologers; the mysterious *libellus* is produced by Vibius, but the accused denies that he is the author; it is thereupon decided to interrogate the slaves, the public sale takes place, and Libo seeks an adjournment to the following day.[49] All this refers only to the charges preferred by Vibius Serenus, the charges which were being dealt with before those of the other accusers (cf. *singillatim*) and therefore before the charges of *maiestas*. If the latter had already been taken under advisement there would have been no need for the sale to the *actor publicus*.

There was a sequel to Libo's case in A. D. 17, when the senate issued a decree applying a penalty of *aquae et ignis interdictio* and confiscation of property to *mathematici Chaldaei arioli et ceteri, qui simile inceptum fecerunt*.[50] This extension of the *lex Cornelia de sicariis et veneficis*[51] followed the pattern obtaining at the trial of Nigidius Figulus and Ps.-Sallust and expanded on Augustus' legislation on the same subject,[52] and there is no suggestion of any connection with the *lex maiestatis*.[53]

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[48] Tac. *Ann.* 2.30.3.

[49] Ib. 2.30 f.

[50] Ulpian *Coll.* 15.2.1: ‚extat senatus consultum Pomponio et Rufo conss. factum, quo cavetur, ut mathematicis Chaldaeis ariolis et ceteris, qui simile inceptum fecerunt, aqua et igni interdicatur omniaque bona eorum publicentur, et si externarum gentium quis id fecerit, ut in eum animadvertatur.' What must be the same decree is ascribed by Dio 57.15.8 to A. D. 16, but the decrees *de mathematicis Italia pellendis* dated by Tac. *Ann.* 2.32.5 to that year will be *ad hoc* expulsions rather than the definitive enactment described by Ulpian, so that there is no necessary conflict (*pace* Cramer, 237 ff.) between Ulpian and Tacitus on the date. The conflict is between Ulpian and Dio. Ulpian's date is accepted by Levy 2.348, but Sherwin-White, 785 opts for A. D. 16. The consuls in Ulpian are surely decisive: the office was held in A. D. 17 by L. Pomponius Flaccus and C. Caelius Rufus. Ehrenberg & Jones, 41.

[51] That this decree was *ex lege Cornelia de sicariis et veneficis* is almost certain. Cf. Levy, 2.348, citing *Dig.* 48.8.13, and Brasiello, 231 ff.

[52] There were two Augustan decrees. The first is the destruction in 13 B. C. of more than two thousand prophetic writings of anonymous or insignificant authorship. Suet. *Aug.* 31.1. Cf., for the date, Dio 54.27.2. But this episode (it has no connection with *famosi libelli* other than conflagration) had no sequel. The other measure is that of A. D.

Four years later, in A. D. 21, charges were brought against Clutorius Priscus, an *eques Romanus* whose elegy on Germanicus had won him a prize from Tiberius and who had more recently composed a poem about Drusus, during the latter's illness, in the hope of publishing it when Drusus died and winning an even greater prize. Drusus had recovered, but Priscus had been unable to resist reading the poem to a gathering of matrons at the salon of Vitellia. A delator appeared on the scene, Vitellia denied having heard anything but the others were frightened into testifying, and Priscus was convicted by the senate. Haterius Agrippa, consul designate, proposed the death penalty, but this was opposed by Marcus Lepidus. The gravamen of Lepidus' argument was as follows:

> If we have regard only to the abominable utterance (‚nefaria voce') by which Priscus polluted both his hearers and himself (‚polluerit'), no punishment is too great. But even though the abomination and the crime are beyond measure (‚sin flagitia et facinora sine modo sunt'), moderation is counselled both by the emperor's policy and by ancient and recent precedents (‚maiorum et vestra exempla'), and boasts should be distinguished from crimes, and words from evil deeds (‚vana a scelestis, dicta a maleficiis'). This is a case for a balanced sentence. Priscus alive will not endanger the state, nor dead will he teach its enemies a lesson. There is not much to be feared from a man who discloses his abominations (‚suorum ipse flagitiorum proditor') to a lot of silly women. I propose that he be banished, deprived of his property and interdicted from water and fire, and I make this proposal as if he were bound by the *maiestas* law (‚cedat tamen urbe et bonis amissis aqua et igni arceatur: *quod perinde censeo ac si lege maiestatis teneretur*').

But this plea attracted scant support, and Priscus was sentenced to death and executed. The verdict drew a reproof from the absent Tiberius: he commended

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11 which is described by Dio 56.25.5 as having forbidden prophesying to any person alone or concerning death at all. This measure (designated as an edict by Cramer, *Astrology* 249 f., but the only edict in Dio loc. cit. is Augustus' publication of his own horoscope, and a *s. c.* for the prohibition is more likely) is to Cramer, o. c. 251 ff. the *fons et origo* of all subsequent litigation, but there are no known cases with the possible exception of Libo Drusus; and there the astrological charges failed, thus precipitating the definitive measure of A. D. 17.

53 The classical jurists consistently avoid assigning occult material to the rubric *Ad Legem Juliam Maiestatis.* Thus *PS* 5.21, *Coll.* 15.2 *(De Vaticinatoribus et Mathematicis); PS* 5.23.15–19 (the occult sections of *Ad Legem Corneliam de Sicariis et Veneficis*); *Dig.* 48.8.3, 13 (on the same *lex*). There is no occult material in *Dig.* 48.4, *PS* 5.29 or *PS Leid.* 5.8–23.

the piety of those who were quick to avenge even a moderate injury to the emperor, but deprecated so hasty a punishment for words (‚extolleret pietatem quamvis modicas principis iniurias acriter ulciscentium, deprecaretur tam praecipitis verborum poenas'). The senate resolved that in future its verdicts were not to be lodged in the *aerarium* until the tenth day after their pronouncement, so as to give the emperor time to set them aside if he were so minded.[54]

The problem in this case was that Priscus' unfortunate poem had neither made seditious propaganda nor attacked Drusus' character: it had simply predicted his demise, and as such it belonged to black magic and astrology rather than to *ad infamiam alicuius* or *in notam aliquorum*. It is in the light of that fact that a significant phrase in Lepidus' speech, *quod perinde censeo ac si lege maiestatis teneretur*, should be evaluated. The usual supposition – although no one has given it very much thought – is that Haterius Agrippa had proposed (a) that Priscus' words be treated as *maiestas* and (b) that he be sentenced to death, and that Lepidus was now reluctantly conceding (a) but was contending for the normal statutory penalty of interdiction and confiscation under the *lex maiestatis*, instead of the intensified penalty of death.[55] This is possible, but there is an alternative. The phrase *perinde censeo ac si teneretur* is typical of the language employed when the scope of a public criminal *lex* was being extended by interpretation. This is shown most clearly by Claudius' edict extending the *lex Cornelia de falsis:* ‚divus Claudius edicto praecepit adiciendum legi Corneliae, ut, si quis, cum alterius testamentum vel codicillos scriberet, legatum sibi sua manu scripserit, *proinde teneatur, ac si commisisset in legem Corneliam.*'[56] Similar language is attested for a *lex*,[57] a *senatus consultum*[58] and a rescript.[59] On this basis Lepidus, far from grudgingly conceding the applicability of the *lex maiestatis*, was the one who was trying to persuade the senate to make it available, to extend it to a case to which it did not otherwise apply, in order to give Priscus the benefit of the lesser penalty. The emperor's *moderatio* and the temperate Republican and senatorial precedents (‚maiorum et vestra exempla') to which Lepidus was alluding were, respectively, Tiberius' statement

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[54] Tac. *Ann.* 3.49 ff. Cf. Dio 57.20.4.

[55] Cf. the citations of Furneaux, Ciaceri, Dessau, Marsh, Rogers, Kornemann and Koestermann in n. 37.

[56] *Dig.* 48.10.15 pr.

[57] Ib. 48.9.1.

[58] Tac. *Ann.* 14.41.3: ‚additur senatus consulto qui talem operam emptitasset vendidissetve perinde poena teneretur ac publico iudicio calumniae condemnatus.' See also *Dig.* 47.22.1.1, 47.22.2.

[59] *CJ* 9.26.1.1.

after Libo Drusus' suicide that he would have spared Libo if he had not been so precipitate[60] and the penalty of interdiction and confiscation under the *lex Cornelia de sicariis et veneficis*[61] and under the *senatus consultum* of. A. D. 17, but Lepidus chose the *lex maiestatis* in preference to the *lex Cornelia de sicariis* because of its greater flexibility and receptivity to interpretation; in other words, Lepidus cited moderate precedents under the *lex Cornelia* because the case was in the general occult area for which that *lex* was appropriate, but only the *lex maiestatis* was capable of accomodating the substantive extension that was needed.[62]

It is evident that Haterius Agrippa's proposal was not based on the *leges iudiciorum publicorum* at all. It was based on certain rules dealing with magical spells and incantations and reputed to have originated in the XII Tables. The elder Pliny has this to say: ‚quid? non et legum ipsarum in duodecim tabulis verba sunt: qui fruges excantassit, et alibi: *qui malum carmen incantassit?*'[63] Cicero attests the following: ‚nostrae ... duodecim tabulae cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt: *si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri.*'[64] The rule attested by Pliny is undoubtedly connected with malevolent utterances; the rule described by Cicero is less securely in point, since many would see it as sanctioning defamation rather than incantation,[65] but it is equally possible that the primitive *malum carmen* did not draw a clear distinction between insult and enchantment, and that Cicero is in fact referring to the same rule as Pliny.[66] In any case, Pliny's evidence by itself suffices to establish the precedent that Haterius Agrippa needed. The precedent may have been put to use before A. D. 21. One recalls Cicero's malediction on Caesar in 45 B. C.: ‚eum σύνναον Quirini malo quam Salutis.'[67] If specific charges played any part in the triumvirs' decision to pro-

[60] Tac. *Ann.* 2.31.4.

[61] On this penalty see Levy, 2.345 ff. Other *leges* with the same penalty are *Pompeia de parricidiis, Julia de vi, Julia ambitus.* Mommsen, *Strafr* 632 and n. 2, 644 and n. 3; Levy, 336 ff., 343 f., 345; Bauman, *CM* 155; Mayer-Maly, *Kl. P.* 1.477.

[62] Words which were not *ad infamiam* or *in notam* had already been subsumed under the *lex.* Cf. ch. IV at nn. 52–3.

[63] *FIRA* 1.52. Cf. ib. 1.55, 63.

[64] *FIRA* loc. cit.

[65] For the texts see *FIRA* loc. cit. Cf. Bauman, *CM* 247 and n. 4. For a summary of the literature see Brecht, *RE* 17.1752 ff. s. v. *Occentatio,* and for later additions Bauman, *CM* 246 and n. 3, 247 nn. 5, 6. Add E. V. Marmorale, *Naevius Poeta,* Catania, 1945, 44 ff.; A. C. Johnson *et al. Ancient Roman Statutes,* Austin, 1961, 15 n. 67; Ronconi, „„Malum Carmen" e „Malus Poeta"', *SAR* 958 ff.

[66] Ronconi, pass.

[67] Cic. *Ad Att.* 12.45.2.

scribe Cicero two years later, this utterance could well have come into it. In any event, the decision in Priscus' case was destined to have a long currency, for it was certainly a crime in Tertullian's day to call the emperor a *divus* during his lifetime: ‚maledictum est ante apotheosin deum Caesarem nuncupare.'[68]

Other cases of astrology prior to A. D. 49 need not detain us, for according to F. H. Cramer, the author of the only detailed study on the subject, it was only in that year that occult practices reached the end of their ‚evolutionary period' and began generating ‚*prima facie* evidence of maiestas'.[69] Our first task therefore is to decide how far Cramer's findings in regard to cases in and after A. D. 49 are well-founded. The first group of cases occurs in Claudius' reign, namely Lollia Paulina in 49, Camillus Scribonianus and his mother in 52, Statilius Taurus in 53 and Domitia Lepida in 54.[70] In none of these cases is there any suggestion of a charge of *maiestas* in the sources, and to infer such a charge is out of the question, for all of them fall squarely within the most decisive period of abeyance of the *lex maiestatis*. This heavy concentration of occult cases in Claudius' reign is no accident: the delators were seeking some recompense for the cessation of the *crimen maiestatis*.

With the trial of Barea Soranus in 66 we are once more in an active period of the *lex maiestatis*, but there is no substance in Cramer's view[71] that magic was charged as *maiestas* in this case. Tacitus draws a sharp distinction between the charges against Soranus himself and those against his daughter, Servilia. Soranus was charged with acts committed during his governorship of Asia, such as his friendship with Rubellius Plautus (executed in 62 on suspicion of conspiracy[72]) and his cultivation of provincials for seditious purposes.[73] After supplying this information Tacitus breaks off in order to attend the trial of Thrasea Paetus, but on returning to Soranus he recapitulates the charges on the same lines as before.[74] He adds that all this was an old affair, but that a more recent event was now made use of in order to involve Servilia in her father's misfortunes,

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[68] Tert. *Apol.* 34.4; cf. *Ad Nat.* 1.17. The rule was probably known to Nero. Tac. *Ann.* 15.74.5.

[69] Cramer, *Astrology* 254 ff. and esp. 259, 270. The cases discussed by Cramer, 255 ff. prior to A. D. 49 (they do not include Clutorius Priscus) are Aemilia Lepida in 20, Claudia Pulchra in 26 and Mam. Scaurus in 34.

[70] Tac. *Ann.* 12.22.1, 12.52.1 ff., 12.59.1 ff., 12.65.1 f. Cf. Suet. *Ner.* 7.1. See also Cramer, *Astrology* 261 ff.

[71] *Astrology* 264.

[72] Tac. *Ann.* 14.57 ff.

[73] Ib. 16.23.2.

[74] Ib. 16.30.1.

namely the fact that she had paid out large sums to magicians.[75] Servilia replied that she had consulted them on her father's prospects in his pending trial; her father had had nothing to do with it, and if a crime had been committed she alone was to blame.[76] This drew from Soranus the assertion that she had not accompanied him to his province, had been too young to know Plautus, and had not been implicated in the charges of conspiracy against her husband.[77] Soranus then asked for a separation of trials on the ground that the two indictments, although unconnected both in law and in fact, carried the threat of prejudice to his daughter if they were heard together.[78] There is not the slightest suggestion in all this that the charge against Servilia was *maiestas* or that the charges against Soranus included astrology.[79]

Domitian's execution of Mettius Pompusianus is more difficult. Mettius possessed an *imperatoria genesis*, an imperial horoscope indicating a conjunction of stars at his birth favourable to his accession to the throne. This had not been held against him by Vespasian,[80] but Suetonius implies that it played some part in the charges brought against him by Domitian.[81] However, the position is possibly retrieved by the fact that Dio knows nothing of the inclusion of the imperial horoscope in the charges; he says – and he is supported by Suetonius – that the gravamen of Mettius' offence was his possession of a map of the world and his addiction to the speeches of rulers in Livy.[82] Suetonius adds that Mettius gave his slaves the names of Mago and Hannibal,[83] which may indicate a claim by the accused to a lineage going back to the Punic wars.[84] Reminding the Flavians that they were imperial new boys was a not uncommon amusement,[85] and the whole thing may amount to assertions and attitudes by Mettius *in notam aliquorum*.

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[75] Ib. 16.30.2.

[76] Ib. 16.31.

[77] Ib. 16.32.1. The husband, Annius Pollio, had been exiled for his part in the conspiracy of Piso. Ib. 15.56.4, 71.6; 16.30.4.

[78] Ib. 16.32.1: ‚nimiae tantum pietatis ream separarent atque ipse quamcumque sortem subiret.'

[79] P. Anteius Rufus and M. Ostorius Scapula had dealings with astrologers in connection with their conspiracy in 66, but they were not put on trial under any public criminal *lex*. Ib. 16.14.1–5.

[80] Suet. *Vesp.* 14.

[81] Suet. *Dom.* 10.3.

[82] Dio 67.12.2 ff. Cf. Suet. loc. cit.

[83] Suet. loc. cit.

[84] Cf. Arias, 130.

[85] Suet. *Vesp.* 15.

Pedanius Fuscus' enforced suicide for aiming at empire under the stimulus of prophecies and portents[86] implies plotting against Hadrian more than anything else,[87] and the charge of consulting *de imperio* brought against Septimius Severus in Commodus' reign[88] is almost on all fours with what both Ulpian and *Pauli Sententiae* allocate to the rubric *De Mathematicis et Vaticinatoribus* rather than to *Ad Legem Juliam Maiestatis*.[89] In the Severan period itself, the trial of Popilius Apronianus in 205, on an indictment alleging that his nurse had dreamt that he would become emperor and that he had used magic in an attempt to make her dream come true,[90] probably rests on a similar basis to Clutorius Priscus' case. This is suggested by the tragi-comedy of Baebius Marcellinus, the bald-headed accomplice who was led straight from the senate to the scaffold – in flagrant disregard, says Dio (and he was there), of the ten days' *locus poenitentiae* laid down after Priscus' case.[91] One suspects that this indecent haste is the hallmark of the indictment for black magic: the judges wanted to be rid of the evil eye as soon as humanly possible.

The first unequivocal subsumption of occult practices under *maiestas* is in a rescript of Constantius issued in A. D. 358:

> Etsi excepta tormentis sunt corpora honoribus praeditorum (praeter illa videlicet crimina, quae legibus demonstrantur), etsi omnes magi, in quacumque sint parte terrarum, humani generis inimici credendi sunt, tamen quoniam qui in comitatu nostro sunt ipsam pulsant propemodum maiestatem, si quis magus ... in comitatu meo ... fuerit deprehensus, praesidio dignitatis cruciatus et tormenta non fugiat.[92]

Even here the subsumption is a highly selective one. It is certain that *illa crimina quae legibus demonstrantur*, under which office-bearers were already exposed to torture, included the *lex maiestatis*,[93] and it follows that thus far *magi* had not

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[86] *SHA Vit. Hadr.* 23.3. Dio 69.17.1 says that Fuscus' crime was his disapproval of Hadrian's appointment of Lucius Commodus as Caesar – an insult, no doubt, to both Hadrian and Commodus.

[87] Cf. Cramer, *Astrology* 267 f.

[88] *SHA Vit. Sev.* 4.3.

[89] *Coll.* 15.2; *PS* 5.21. Jones, 98 thinks the case against Severus was ‚a charge of treasonable divination', but does not consider the matter very fully.

[90] Dio 77.8.1.

[91] Ib. 77.9.2.

[92] *CTh* 9.16.6 = *CJ* 9.18.7. On the tentative nature of the subsumption see below, and cf. *CTh* 9.38.3, 7, 8; 16.10.7.

[93] But not only it. Cf. Mommsen, *Strafr* 406 f. for the view that the facility here referred to (torture of the accused) was available in *maiestas*, magic and *falsum*.

fallen under that *lex;* and even now their subsumption was qualified by the assertion that their conduct was ‚*tantamount* to an assault on *maiestas*', and it was restricted to members of the emperor's entourage.

It is not surprising, in view of the tentative nature of the rescript of 358, to find that when Palladius embarked on a witch-hunt in 371-2 he brought charges under two distinct heads, those who dabbled in magic *per se* and those who were accomplices in treason[94] – a curious parallel to *ad infamiam alicuius* and *in notam aliquorum.* There is also something not quite solidified about three other passages in Ammianus. The first, 14.7.7 f., records the acquittal of Serenianus on a charge of bewitching a felt cap and sending it to a shrine with a friend, in search of omens concerning the *imperium.* In the second, 16.8.1 f., unnamed victims are said to have been executed for consulting about the squeak of a *sorex* or about an encounter with a *mustela,* or for using an old wife's spell as a palliative for pain. The third, 19.12.1 ff., deals with the witch-hunt conducted by Paulus. The dates, 354, 356-7 and 359, straddle Constantius' rescript, and in each case there is said to be an express involvement of *maiestas.*[95] But this apparently widespread resort to the *crimen maiestatis* in these matters should be treated with reserve. The rescript of 358 restricted subsumption to those *in comitatu meo,* which does not seem to encompass the unnamed victims of Ammianus' second passage; and when Ammianus says that the offences adjudicated on by Paulus' commission included passing by a grave by night, but adds that the offender was dealt with as a poisoner *(ut veneficus),* he weakens the picture of a commission exclusively concerned with *maiestas* and suggests that it was in fact the forerunner of Palladius' mixed commission.[96]

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[94] Amm. 29.2.2. ‚multos intra casses lugubres includebant, quosdam veneficiorum notitia pollutos, alios ut appetitoribus imminuendae conscios maiestatis.' ‚Imminuendae' proves either that Ammianus had read Cicero or (*pace* Cloud, 217) that ‚*laesa* maiestas' had not become ‚standard towards the end of the principate of Tiberius'. Cf. Sen. *Contr.* 9.2.9, 11 (Müller).

[95] Serenianus was ‚pulsatae maiestatis imperii reus iure postulatus ac lege'; the second group is introduced with ‚per simulationem tuendae maiestatis imperatoriae, multa et nefanda perpetrabantur'; and Paulus' commission dealt with ‚quaedam colorata laesae crimina maiestatis'.

[96] The dividing-line postulated by ‚in comitatu meo' turns on the personality of the wrongdoer rather than of the victim, and in this respect Constantius was returning to the original conception of *maiestas* as an offence peculiar to the senatorial and official classes. Cf. Bauman, *CM* 87 f. But it is perhaps safer to suppose that the rescript of 358 was not the only decree on the subject and that other classes were encompassed. The ultimate test for deciding whether or not to elevate a given magical act will therefore have been the identity of the person at whom it was aimed.

The mid-fourth century was evidently a period of transition, but there was not yet an out-and-out subsumption of occult practices under *maiestas*, and *a fortiori* there was no such subsumption in the Principate. The tendency was to treat these practices as evidence of treason, especially of conspiracy, and to that extent they were associated with *maiestas* in numerous cases, but if it was a question of charging such practices specifically it was done either under an extension of the *lex Cornelia de sicariis et veneficis* or under the XII Tables, and not under the *lex maiestatis*.

IV. IMPIETAS IN PRINCIPEM: THE DIVUS AND THE EMPEROR

1. Divus Augustus: Desecration of images, perjury and defamation

In A. D. 15 charges were brought by unidentified accusers against a certain Falanius and a certain Rubrius. Tacitus notes that the charges were *praetemptata crimina* and the accused *modici equites Romani*, by which he implies that someone wanted to make a test case and chose political lightweights for the purpose. Falanius was alleged to have enrolled a mimist of doubtful reputation among the *cultores Augusti* and to have included a statue of Augustus in the sale of a property, while the charge against Rubrius was that he had violated the *numen Augusti* by a false oath: ‚crimini dabatur violatum periurio numen Augusti.'[1]

In a rescript to the consuls[2] Tiberius ruled against all these charges: the mimist had taken part in the games instituted by Livia in memory of Augustus; it was not *contra religiones* for statues of Augustus, like those of other *numina*, to accede to sales of property *(venditionibus accedant)*; and as for the perjury, it was to be treated as if it were a false oath by Jupiter and was not to be actionable, for the principle to be observed was *deorum iniuriae dis curae*.[3]

Tiberius' ruling on the charge of selling a statue of Augustus with a property was dictated by sound practical considerations, if by nothing else, for to have accepted the charge would have opened the door to violent inroads into the rule of *superficies solo cedit*[4] (cf. *venditionibus accedant*) and crippling uncertainty as to the nature and scope of the *res vendita* in contracts of sale. Commercial considerations may also have had something to do with the ruling on the perjured oath,[5] and there were no doubt practical reasons why membership of a harmless

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[1] Tac. *Ann.* 1.73.

[2] Ib. 1.73.3: ‚scripsit consulibus.' It was in the same document that Tiberius laid down the general proposition that the deification of Augustus had not been decreed in order to be turned to the destruction of citizens. Cf. ch. I at n. 73.

[3] Tac. *Ann.* 1.73.3–5.

[4] Gaius 2.73; *Inst.* 2.1.30.

[5] On *iusiurandum* in pacts and contracts and the built-in praetorian sanctions see Buckland, 458, 529, 633, 659. Cf. Mommsen, *Staatsr* 2.103 n. 3, 810 nn. 4, 5; Simon, *Kl. P.* 3.14. The addition of a *maiestas* sanction would have meant a double penalty, and one out of all proportion to a breach of contract.

collegium[6] should not be circumscribed by a morals test. But the unknown accusers do not deserve the disparaging remarks that have been made about them,[7] since they were simply attempting – in response, we may well think, to popular pressures[8] – to define the status of Divus Augustus in a meaningful way. Nor were they the first to undertake such a task, for something similar had possibly been done during Augustus' lifetime, when an enterprising accuser had charged Aemilius Aelianus Cordubensis with the habitual expression of bad opinions of Caesar, but had failed in what just may have been an attempt to clarify the position of Divus Julius.[9] The present accusers may have recalled, however, that Tiberius had not seen eye to eye with Augustus in such matters[10] and may have hoped that he would take a similar view now.

The case against Falanius is readily assignable to *iniuria*. The enrolment of the infamous mimist is, in general outline, on all fours with the pattern case under the edict *Ne quid infamandi causa fiat*,[11] while the charge concerning the statue will have been fortified by a recent opinion of Labeo almost directly in

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[6] On the collegiate character of the *Cultores Augusti* see Koestermann, *TA* 1.239.

[7] Thus Koestermann, *Majestät* 83: ‚banal und geringfügig.'; Taeger, 220: ‚belanglose Dinge.' Cf. Koestermann, *TA* 1.239; Marsh, 109; Walker, *The Annals of Tacitus*, Manchester, 1952, 21.

[8] Cf. perhaps the important part played by popular pressure in shaping the posthumous status of Caesar. Cerfaux & Tondriau, 291 ff.; Z. Yavetz, *Plebs and Princeps*, Oxford, 1969, 80 f. A more specific link, especially with the charge concerning the mimist, is the close connection (Cerfaux & Tondriau, 325) between the *Cultores Augusti* (‚des affranchis et de petites gens qui s'occupaient du culte des Lares Augustaux') and the *Numen Augusti*.

[9] Suet. *Aug.* 51.2, attesting this as the main count against the accused: ‚inter cetera crimina vel maxime obiceretur quod male opinari de Caesare soleret.' Augustus, who was trying the case himself, pretended to be angry when the charges were read out, but in fact dropped the case: ‚nec quicquam ultra aut statim aut postea inquisiit.' In Suetonius' context (51.2 f.) it is possible, however, that ‚de Caesare' refers to Augustus himself (so Jones, 92), although Suetonius' usage in his biography of Augustus may be against this: he refers to the emperor by name some fifteen times, and always as ‚Augustus' (except 58.2, quoting Valerius Messala's speech: ‚Caesar Auguste!'); he refers to ‚Caesar' some fifteen times other than the present case, and always means the elder Caesar; moreover, his usage vacillates so much that ‚Divus Iulius' in 94.11 means the elder Caesar during his lifetime, and ‚Divus Caesar' in 96.1 means the elder Caesar as a god. In any event, see Gagé, 23 and Syme, *RR* 317 f., 442 on the general devaluation of Caesar in the Augustan Principate. The essential point for our purpose is that Divus Julius was not subsumed under the *lex maiestatis*. He may have been subsumed later on, by Nero (cf. at nn. 213–5 below), but that does not affect any of the cases under Tiberius. See also at nn. 175–84 below.

[10] Suet. *Aug.* 51.3.

[11] See Daube, 413 ff., 433 ff. on the pattern case.

point.[12] In principle there was nothing against the elevation of such *iniuriae* to *maiestas*, but the trouble was, of course, that the injured party was no longer an *inlustris* but a Divus, no longer a man but a god.

The false oath has a complex Republican ancestry. Cicero's *periurii poena divina exitium, humana dedecus*[13] is usually taken to reflect the lack of a criminal sanction for perjury in the Republic,[14] *dedecus* here being simply censorial or praetorian *infamia*, but two passages in Plautus need to be considered. The first attests *intestabilis esse* as the penalty for perjury: ‚iuro per Iovem et Mavortem me nociturum nemini. quid si id non faxis? ut vivam semper intestabilis.'[15] The second passage suggests that *intestabilis esse* was the penalty even for a temporal crime, *stuprum*, in proceedings *apud populum:* ‚ne, ... feminam honestam te corrupisse populus si sciat, tibi sit probro; semper curato, ne sis intestabilis. amato testibus praesentibus.'[16] The point of *ne sis intestabilis* doubtless depends on *amato testibus praesentibus*, but there would be no play on words unless *intestabilis esse* was a legal penalty. We seem to have here one of those curious correlations between the penalty called down on himself by an oath-taker and the penalty for a recognised temporal offence which make their appearance in Roman criminal law from time to time.[17] The accusers of A. D. 15 may have been able to base an argument on another such correlation, namely between the penalty for perjury and the penalty laid down by the *senatus consultum* of A. D. 6. Another possible link is the type of Republican statute under which refusals to swear to observe the law's provisions were penalised (possibly as *maiestas*),[18] although this is weakened by the fact that the converse case – taking the oath and then breaching it – was treated as a violation of the statute itself rather than of the oath.[19]

What are the prospects for a legislative origin for the doctrines discussed in A. D. 15? The *senatus consultum* decreeing Augustus' consecration[20] can safely be ruled out, if only because Tiberius' rescript to the consuls was evidently a

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[12] *Dig.* 47.10. 27: ‚si statua patris tui in monumento posita saxis caesa est, sepulchri violati agi non posse, iniuriarum posse Labeo scribit.' See also Bauman, *CM* 290 ff.

[13] Cic. *Leg.* 2.9.22.

[14] Mommsen, *Staatsr* 2.810, *Strafr* 578 ff., 580 n. 1; Ciaceri, *Tiberio*, Rome, 1944, 83 f.

[15] Plaut. *Mil Glor.* 5.21 ff. Cf. Hor. *Sat.* 2.3.180 f.; Porph. ad loc.; Schol. ad loc.

[16] Plaut. *Curc.* 30 f.

[17] Bauman, *CM* 230 f., 232 f.

[18] Ib. 56 f., 93 n. 1.

[19] E. g. *lex de piratis persequendis, FIRA* 1.121 ff. at 128, 129 f.

[20] Ehrenberg & Jones, p. 52 s. v. *xv k. Oct.*

ruling on the scope of the consecrating decree[21] and would not have been necessary if that decree itself had defined the new god's status.[22] Another possibility is the legislation of 42 B. C. on the subject of Divus Julius. The honours voted at that time included the compulsory celebration of Caesar's birthday, on pain not only of becoming accursed to Jupiter and Caesar but also – in the case of senators and their sons – of paying a fine of one million sesterces[23] (which also happens to have been the going rate for seeing a Divus ascend to heaven[24]). This reinforcement of the religious sanction by a criminal penalty proper[25] is in marked contrast with the birthday festival voted to Caesar during his lifetime,[26] for on that occasion no penalty is mentioned. More specifically on the question of an oath, the honours voted to Caesar in his lifetime included an oath by his Genius,[27] and although the re-enactment of this for Divus Julius is not attested it is a fair inference, not only because the honours previously voted to the man were in all probability comprehensively re-enacted, *mutatis mutandis*, for the god,[28] but also because of the dedication *genio deivi Iuli parentis patriae quem senatus populusque Romanus in deorum numerum rettulit*.[29] The title of *parens patriae* had been conferred in Caesar's lifetime,[30] but its appearance in this posthumous credential seems to point to something more than simple continuation. If this title was the crucial factor in the cult of Divus Julius,[31] and if the sensitivity of the *pater patriae* to *laesae religiones ac violata maiestas* in 2 B. C. is any guide, both the title and the Genius with which it is

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[21] Cf. n. 2.

[22] No light is shed on our problem by Herodian 4.2 ff. or by whatever else is known (Vittinghoff, 106 ff.) about the weird ceremonies of consecration. The important discussion by Weinstock, 386 ff. (the ‚trial' of the prospective Divus) adds a constitutional dimension, but not one directly germane to our problem.

[23] Dio 47.18.5.

[24] Ib. 56.46.2; 59.11.4.

[25] Even though not the penalty for *maiestas*. It is not easy to say which of the public criminal *leges* could have been invoked. There may be room for something on the lines of the special type of *iudicium publicum* uncovered by Jones, 45 ff.

[26] Dio 44.4.4.

[27] Dio 44.6.1 – τύχη, but in 57.9.3 he uses the same word for what is clearly the *Genius* or *Numen Augusti*. See also Taeger, 68.

[28] Dio 47.18.1 f. says that the triumvirs exalted Caesar not only by the honours that had been voted in his lifetime but also by others which they now added. For a full discussion see Taylor, 96 ff. Cf. Cerfaux & Tondriau, 293.

[29] Rotondi, 436 f.

[30] Bauman, *CM* 137 ff., 236.

[31] Taeger, 82, 86 f. Cf. Cerfaux & Tondriau, 324.

coupled may have been given a penal safeguard in 42, or may have developed one subsequently.

This is as far as one can take the legislation of 42 B. C. It will have been a remote precedent at best, and one somewhat weakened by the subsequent devaluation of Divus Julius, but it is precisely in connection with the cult of the Genius that it may have had some persuasive force, for it was here that there was an Augustan restoration of Caesarian arrangements.[32] In any event, what is perhaps more important than the specific exemplary value of this legislation is its demonstration of the ability of a Divus to acquire rights with public criminal safeguards, and thus to achieve a constitutionally meaningful position in the state.

There is no trace of comparable legislation for Divus Augustus, nor is there any suggestion of a re-affirmation for him of the all-important title of *pater patriae:* his status as father of his country had been a focal point of the cult of the *Numen Augusti* in his lifetime,[33] but after his death it does not appear in dedications or cult regulations.[34] This possibly means that the accusers of A. D. 15 were not able to rely on the powerful contention that they were defending the majesty of the *pater patriae,* although they may have tried to argue that this status had carried over without formal revalidation, in which case *ut alia numinum simulacra* and *ius iurandum perinde aestimandum quam si Iovem fefellisset* in Tiberius' rescript[35] might be seen as the emperor's rebuttal of such an argument. The reference to Jupiter was carefully thought out: he was the supreme embodiment of Roman *maiestas,*[36] and if he could not claim a criminal sanction for perjury then no one could. The final argument that may be envisaged for the accusers is one based on the close connection between *numen* and *maiestas.*[37] The *locus classicus* is Cicero's pledge to show the same *pietas* to the Roman people as to the gods, to hold the *numen* of the *populus Romanus* in the same reverence and sanctity as the *numen* of the gods, and never to fail in his duty to the *res publica*[38] – not quite an equation of *numen p. R.* with *maiestas p. R.,*[39] but certainly suggestive of a strong link. The same parallel, but never

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[32] Cerfaux & Tondriau, 326.

[33] Ehrenberg & Jones, 100A, 100B. Contra apparently 105 a.

[34] Ib. 101, 106, 107, 111, 112.

[35] Tac. *Ann.* 1.73.4 f.

[36] Bauman, *CM* 6 f., 212 f., 240.

[37] On this connection cf. Taeger, 152 f.

[38] Cic. *Ad Quirit.* 18; cf. 25. The other passages cited by Taeger, 152 n. 91 are less clearly in point.

[39] Cf. Taeger, 152, 221.

quite coalescent, paths are traced by *numen imperatoris* and *maiestas*,[40] and there are other apposite examples.[41]

There is a possible ambiguity in the *deorum iniuriae dis curae* which Tacitus attests as the concluding words of Tiberius' rescript. *Prima facie* this applies only to the false oath, thus seeming to point to a significant difference in Tiberius' rulings in the two cases. In Falanius' case he will have ruled on the merits: this mimist was not of bad character, this alienation of a statue was lawful, but on different facts a receivable charge might lie. But in Rubrius' case the ruling was definitive: the remedy was to be excluded under all circumstances.[42] The trouble is, however, that Falanius' acts were also *deorum iniuriae* and should have fallen under the dictum – it cannot, of course, be supposed that the two cases were not dealt with by Tiberius in one document (‚*quae* ubi Tiberio notuere, scripsit consulibus'[43]). Some possible assistance is furnished by the trial of M. Granius Marcellus, a former proconsul of Bithynia, later in A. D. 15. Marcellus faced a charge *de repetundis* and three charges of *maiestas*, of which the first, defamation of Tiberius, was lodged by the accuser Caepio Crispinus at the same time as the *postulatio de repetundis;* the other *maiestas* charges – placing his statue above those of the Caesars and removing Augustus' head from a statue and replacing it by the head of Tiberius – were added later by another accuser, Romanius Hispo.[44] The latter's ingenuity was not entirely misplaced, for it could conceivably have been argued that to displace and mutilate the statues was tantamount to pronouncing some sort of unofficial *memoriae damnatio*, to asserting that the Divus and the emperor were nothing more than *hostes*.[45] But Tiberius lost his temper when Hispo's charges were subjoined and insisted on a vote being taken openly and on oath[46] – that is, on the senate being sworn in as

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[40] *CIL* 7.875, 11.6107, 3.2970, 3.10060: ‚genio ac maiestati', ‚numini maiestatique'.

[41] Thus, *patria potestas* and *populus Romanus*, *patria potestas* and *maiestas*, *pater patriae* and *paterfamilias*. Cf. Bauman, *CM* 236f. – For some remarks on the link between the Genius of the Roman people and the Genius of the emperor, see Levi, pass.; and, for a detailed, although non-juristic, examination of the oath to the emperor's Genius, Böhmer, pass.

[42] On its subsequent history see at nn. 196–202 below.

[43] Tac. *Ann.* 1.73.3.

[44] Ib. 1.74.1–4.

[45] On the destruction of statues as part of the *damnatio* see Vittinghoff, 13f., 47, 56 n. 244 and pass.

[46] Tac. *Ann.* 1.74.4f.: ‚addidit Hispo statuam ... inditam. ad quod exarsit adeo ...' It is not clear why Koestermann, *TA* 1.242 has doubts as to why Tiberius lost his temper. To refer it to the ‚sinistros sermones' of 1.74.3 (so Koestermann) is logically indefensible, for it means ignoring Hispo's charges, 1.74.4, completely. If Tacitus had

a formal court, as distinct from an ordinary session at which it might simply have debated a *receptio inter reos*.[47] The outcome was an acquittal.[48] Tiberius' insistence on a formal trial is at least consistent with his having wanted a definitive verdict on an issue – *deorum iniuriae* in its desecrated statues aspect – on which his previous ruling had not been understood to be conclusive, due perhaps to the ambiguous form in which his rescript had been couched. It may not be a coincidence that Tacitus chooses to inject a denunciation of the delators' methods into his account of this leading case.[49]

Divus Julius may have been involved in an incident in A. D. 16, when Vibius Rufus was, much to the surprise of Dio, not prosecuted for sitting on Caesar's curule chair.[50] This would agree well with the negative position established by the cases of 15, but the trouble is that Dio adds that Rufus was consorting with Cicero's wife – nearly sixty years after Cicero's death. This is not one of Dio's more lucid moments, and we pass on to A. D. 17 and the charges of *maiestas* preferred against Appuleia Varilla. It was alleged, first, that she had made insulting remarks about Divus Augustus, Tiberius and Livia; and second, that she, the grand-daughter of Augustus' sister and a member of the imperial house, had committed adultery: ‚Appuleiam Varillam, sororis Augusti neptem, quia probrosis sermonibus divum Augustum ac Tiberium et matrem eius inlusisset Caesarique conexa adulterio teneretur, maiestatis delator arcessebat.'[51] It will be observed that both charges were framed under the *lex maiestatis*. An astute delator was trying to bring three doctrines under the umbrella of *maiestas:*

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wanted a Tiberius enraged at verbal attacks on himself he would not have used the equivocation that Koestermann's postulate requires.

[47] Contra Avonzo, *Senato* 100 f., who holds that no oath was required except sometimes in the final vote (why only sometimes?), and Rogers, *Trials* 79 f., to whom a verdict on oath was an indication of the seriousness with which an offence was viewed (but Cassius Severus was relegated – not deported – *iudicio iurati senatus,* Tac. *Ann.* 4.21.5, and in any event Rogers contradicts himself when he refers, o. c. 10, to ‚the absurdity of the charges' in Marcellus' case). It is very possible that verdicts had to be given on oath in matters regarded as test cases.

[48] That is, on the *maiestas* charges. Tac. *Ann.* 1.74.7: ‚permotus his, quantoque incautius efferverat, paenitentia patiens tulit absolvi reum criminibus maiestatis.' This, following on Cn. Piso's implied criticism of the demand for a verdict on oath (1.74.6), is the one hindrance to the view taken in the text, especially if ‚tulit' means ‚tolerated' rather than ‚proposed'. But a grudgingly acquiescent Tiberius is difficult here, in view of his attitude earlier in the same year. In any event, Marcellus' case is very unstable. Cf. Suet. *Tib.* 58; Dio 57.24.7. Cf. nn. 59–61.

[49] Tac. *Ann.* 1.74.1 f.

[50] Dio 57.15.6 f.

[51] Tac. *Ann.* 2.50.1.

verbal injury to a god; verbal injury to the emperor and his mother; and adultery by a connection of the emperor.

Tiberius ruled that the adultery fell to be dealt with under the *lex Julia de adulteriis,* and on the verbal injuries he drew a distinction: the accused should be condemned if she had made any impious remarks about Augustus – *si qua de Augusto inreligiose dixisset* –, but no action was to be taken on the remarks made about himself or (as he informed the senate later, after consulting her) his mother.[52] The language is carefully chosen. Attacks on Divus Augustus were not weighed up as *ad infamiam alicuius* or *in notam aliquorum,* but as *inreligiose dicta.* It is not for nothing[53] that Tacitus prefaces his account of this case with the observation that the *lex maiestatis* was ‚growing up': ‚adolescebat interea lex maiestatis.'

The account ends on a note of anti-climax: ‚liberavitque Appuleiam lege maiestatis.'[54] It is not the acquittal that troubles us, but the fact that it is credited to Tiberius. The emperor no doubt retained the power to intercede at any stage of a trial,[55] but Tiberius had already given the signal for the case to proceed, and as he had been so careful not to prejudge the merits (‚postulavit damnari, si qua ... dixisset') one might have expected the verdict to be left to the senate; in the event of its misdirecting itself there would still have been time (the ten days' interval) for intervention by the emperor. It must be supposed that the evidence was so unsatisfactory that Tiberius put a summary end to the proceedings, but it is most unfortunate that Tacitus is not more explicit about this all-important case. However, the senate made Tiberius' *si qua inreligiose dixisset* ruling its own by agreeing to the *receptio inter reos,*[56] and this must be accounted the bridge-head that the delators had been striving for some two years to establish on behalf of Divus Augustus.

The *senatus consultum* accepting the charge of *inreligiose dicta* against Appuleia Varilla is the most important single ruling in the entire history of

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[52] Ib. 2.50.2 ff. and esp. 2.50.4: ‚interrogatus a consule, quid de iis censeret quae de matre eius locuta secus argueretur, reticuit; dein proximo senatus die illius quoque nomine oravit, ne cui verba in eam quoquo modo habita crimini forent.' Why the general ruling, ‚ne *cui* ... forent', when only Appuleia's culpability was in issue? Equally strange is the consultation of the injured party in what was presumably a public accusation lodged by the first comer. We uneasily recall Baebius Massa's instant accusation and Quintilian's ‚maiestatis *actio*'. A good deal of the *iudicium legis Corneliae* seems to have been capable of surviving elevation.

[53] Pace Walker, *Annals* 96.

[54] Tac. *Ann.* 2.50.4.

[55] Ciaceri, *Tiberio* 94.

[56] On the *receptio* as a ruling on the law see Avonzo, *Senato* 82 ff.

impietas in principem. Not only did it establish Divus Augustus' right to the protection of the *lex maiestatis* but it also laid the foundation for the ambivalent position of the living emperor, for the encroachment of *principalis maiestatis veneratio* on the perfectly logical preserve of *in notam aliquorum.* Tiberius knew that the boundary between *laesae religiones* and *violata maiestas* was a fragile one, and it was because of this that he tried to keep the question of Divus Augustus' *existimatio* separate from the similar questions concerning his mother and himself, but this hope was to prove illusory. Events moved so rapidly in the direction of equating the position of the emperor with that of the Divus that when Dio looked back to the case of Appuleia Varilla, all that he was able to discern was a series of charges of *asebeia* being driven home in respect of insults to Augustus, Livia and Tiberius alike.[57]

Tacitus' less than adequate account is not the only frustrating feature of Appuleia Varilla's case. Having come as far as a formal acceptance of the new doctrine, we begin thinking of a sequel, of a case in which an actual conviction ensued. But, apart from special institutional cases like asylum, provincial misconduct and imperial solidarity – in which, in any case, the emperor and the Divus were equally concerned –, it is extraordinarily difficult to find any concrete support for Pliny's assertion that Augustus was deified in order to activate the *crimen maiestatis.*[58] This is exemplified by the catalogue which Suetonius offers in support of his assertion that Tiberius enforced the *lex maiestatis* most rigorously.[59] The cases, which are not necessarily in chronological order, are all concerned with Divus Augustus, beginning with the man who removed Augustus' head from a statue in order to replace it by that of another *(ut alterius imponeret)* and was, after a trial in the senate in which a conflict of evidence was resolved by torture, condemned.[60] This is the case of Granius

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[57] Dio 57.19.1 (Cary 7.164).

[58] Plin. *Pan.* 11.1 f.: ‚Dicavit caelo Tiberius Augustum, sed ut maiestatis crimen induceret ... Tu sideribus patrem intulisti non ad metum civium.' The rendering of *induceret* as ‚activate' in the text is intended to emphasise that there can be no question of a special *lex maiestatis* having been introduced at the time of Augustus' consecration. See also below. Contra (although, one suspects, without realisation of the difficulties) *TLL* s. v. *inducere* (‚novum quid introducere, instituere, importare'); Durry, Budé ed. of Pliny (‚pour introduire l'accusation'). Malcovati, *Il Panegirico di Traiano,* Florence, 1949, 12 is to the point with ‚per dar luogo alle accuse'. Furneaux, 1.274 thought that Pliny had said ‚sed ut maiestatis legem reduceret', but the reading is not attested.

[59] Suet. *Tib.* 58.

[60] Ib.: ‚acta res in senatu et, quia ambigebatur, per tormenta quaesita est.' Mommsen, *Strafr* 406 n. 3 thought that only the evidence of the accused was meant, but in fact it is the free witnesses as well as the accused who were tortured. Suetonius gains some

Marcellus with the wrong ending, and oddly enough Suetonius agrees with Tacitus that it was a case of major importance, although for different reasons: ‚damnato reo paulatim genus calumniae eo processit, ut haec quoque capitalia essent.' If it were not for Suetonius' ‚ut *alterius* imponeret' one might be prepared to credit him with a case reversing the ruling in Marcellus' case, but it is quite incredible that Suetonius should not have known the identity of *alterius*.[61] The next capital condemnation attested by Suetonius is for punishing a slave near a statue of Augustus *(circa Augusti simulacrum);* this is a matter of asylum, and is probably a generalisation from the debate of A. D. 21.[62] It is followed by a conviction for changing one's clothes near Augustus' statue, which may be intelligent anticipation by Suetonius of the contemporary case of the woman who undressed in front of Domitian's statue,[63] and by convictions for taking rings or coins impressed with Augustus' image into privies or brothels, which is possibly an inflation of a single incident concerning Tiberius' image reported by Seneca.[64]

Suetonius' two concluding examples merit closer scrutiny. The first is his assertion that it was a capital crime to criticise any word or deed of Augustus: ‚dictum ullum factumve eius existimatione aliqua laesisse.' The origins of this remark can be pinpointed beyond all reasonable doubt. In A. D. 15, very soon after the rulings in the cases of Falanius and Rubrius, Tiberius declared that it would be an act of impiety for him to override any *responsum* of Divus Augustus: ‚Divus Augustus ... responderat, neque fas Tiberio infringere dicta eius.'[65] Elsewhere, under A. D. 25, Tacitus has Tiberius expressly attribute the force of law to Augustus' acts: ‚qui omnia facta dictaque eius vice legis observem.'[66] These pronouncements were not a mere restatement of the obligations assumed by all senators and magistrates when they swore to observe Augustus' *acta*.[67] The penalty for refusing to swear that oath was expulsion from the senate,[68] but something quite different claimed Tiberius' hurried attention in the after-

credence from the fact that his assertion is in respect of a senatorial trial. See also Kübler, 553. On balance, however, Suetonius' evidence should be rejected. See below.

[61] There is no need to assume that Suetonius is describing a later case. Dio 57.24.7 does have such a case under A. D. 25, but it is a palpable and unintelligible amalgam of Falanius' and Marcellus' cases.

[62] Cf. sec. 3 s. v. ‚Asylum'.

[63] Cf. at n. 82.

[64] Cf. at n. 80.

[65] Tac. *Ann.* 1.77.4.

[66] Tac. *Ann.* 4.37.4.

[67] On this oath see Furneaux, 1.273 f.

[68] Tac. *Ann.* 4.42.3, apropos of Apidius Merula.

math of Rubrius' case. *Deorum iniuriae dis curae* threatened, whether or not it was realised at the time, to nullify the oath to Augustus' *acta*, and Tiberius was constrained to make his allusion to possible *impietas* later in the same year in order to make it clear that even if the subsumption of perjury under the *lex maiestatis* was ruled out, other subsumptions connected with Divus Augustus were still possible.[69] These observations of Tiberius gave Suetonius the impression that a capital penalty had been laid down for any criticism of any word or deed of Augustus.

The final example in Suetonius' catalogue is that of the man who allowed his *colonia* to vote him an honour on the same day that honours had previously been voted to Augustus: ‚periit denique et is, qui honorem in colonia sua eodem die decerni sibi passus est, quo decreti et Augusto olim erant.' Suetonius may not be altogether wide of the mark here, for it is possible that the anniversary of the honours to Augustus was made a special occasion in the *colonia* and given a criminal sanction on the analogy of Divus Julius' birthday. There is perhaps a parallel in the charges of neglecting the cult of Divus Augustus brought against the community of Cyzicus in A. D. 25,[70] and one suspects that a badly battered version of the trial of the Pompeii Macri for persuading Mitylene to vote *caelestes honores* to their ancestor[71] may also have something to do with it: the *caelestes honores* could have been seen as competing with honours voted to Augustus, and the case certainly occurred at a comparable stage of Tiberius' reign (A. D. 33) to that premised by Suetonius' *denique*. It is true that Tacitus does not connect Divus Augustus with the case, but we know that Tacitus differed strongly from Pliny and Suetonius on the question of Divus Augustus' involvement in the *lex maiestatis*, and he has not disclosed the full evolution of that involvement.[72]

It cannot be said, however, that Tacitus has seriously distorted the picture

[69] As, of course, proved to be the case with Appuleia Varilla's *inreligiose dicta*. See also sec. 4 s. v. ‚Provincial Misconduct' and sec. 5 s. v. ‚Imperial Solidarity'.

[70] Tac. *Ann.* 4.36.2. Cf. Dio 57.24.6. The community will have been called upon to answer a specific *crimen*, if Tiberius' defence of the Thessalians (Suet. *Tib.* 8) is any guide. The communal charge is a phenomenon not fully understood. See perhaps Bauman, *CM* 148 ff. The remarks of Kunkel, *Senat* 55 n. 88 may point towards the ultimate solution.

[71] Tac. *Ann.* 6.18.3 ff.

[72] It is idle to speculate on the reasons for this. If one thought that Tacitus had written *Annales* I–VI to validate his preconceived notion of Tiberius as a tyrant, it might be argued that he did not want Tiberius to be relieved of any part of the responsibility by transferring it to Divus Augustus, since the latter was a guarantee of respectability. But such conjectures are never over-impressive and certainly do not illuminate the problems with which this study is concerned.

as far as the volume of cases regarding Divus Augustus is concerned. It should be accepted that the number of such cases was in fact not great, and it may be supposed that once a principle had been submitted to the test of litigation and either accepted or rejected, the need to invoke that principle again did not often arise: there was never a political movement against Divus Augustus. In short, it all comes back to the fact that this sector of the *crimen maiestatis* was not realistically involved in defending the security of the *populus Romanus* and was thus marked out for what was essentially an occasional and specialised rôle. And perhaps that is what Tacitus, with much greater insight than either of his contemporaries, deliberately intends to convey.

2. The emperor: Desecration of images

Whether by accident or design, Tacitus follows the same pattern in respect of the emperor's images as he does in respect of those of Divus Augustus. He describes a case in which a charge of desecration failed, and never returns to the subject for the purpose of attesting a successful charge. The case in question is that of L. Ennius, an *eques Romanus* who in A. D. 22 was charged with *maiestas* for melting down a silver statue of Tiberius and converting it to plate: 'quod effigiem principis promiscum ad usum argenti vertisset.'[73] Tiberius forbade the acceptance of the charge (‚recipi Caesar inter reos vetuit'), but this drew an energetic protest from C. Ateius Capito, the well-known jurist and author of the earliest known work on the public criminal courts.[74] Capito declared that the senate's power of decision should not be encroached upon, nor should so serious an offence go unpunished; the emperor might be lenient with personal wrongs, but let him not be so with injuries to the state: ‚non enim debere eripi patribus vim statuendi neque tantum maleficium impune habendum. sane lentus in suo dolore esset: rei publicae iniurias ne largiretur.'[75] Tacitus adds that Tiberius got Capito's drift perfectly and persisted in his veto: ‚intellexit haec Tiberius ut erant magis quam ut dicebantur, perstititque intercedere.'[76]

What was Capito's drift? It has been suggested that he was being deliberately sarcastic in view of the absurdity of the charge,[76a] but there is much more to it. There are two crisp points in Capito's remarks. The first, *sane lentus in suo*

[73] Tac. *Ann.* 3.70.2.

[74] On Capito see Strzelecki, *Kl. P.* 1.675 with lit.

[75] Tac. *Ann.* 3.70.3.

[76] Ib. 3.70.4

[76a] Rogers, *SAR* 126.

dolore esset, is a reference to the doctrine enunciated by Tiberius at the trial of Cn. Piso in 20, to the effect that he would not use his official powers as emperor to avenge private wrongs.[77] The second point, *rei publicae iniurias ne largiretur,* raised the issue of whether the melting down of the statue was a private wrong or a *rei publicae iniuria,* and the test proposed by Capito was whether it was *tantum maleficium* (cf. *atrociora maleficia* in the edict of A. D. 8): if it was, then it was a case of *iniuria atrox,* the crime was *maiestas p. R. minuta,* and it was for the senate, not the injured party, to say whether the charge should proceed. Capito wanted to avoid any suggestion of ambiguity such as that which had clouded Tiberius' rescript in 15. There was a danger that the act of intercession on behalf of Ennius might be attributed to the fact that he was the son-in-law of Thrasyllus, Tiberius' astrologer,[78] but by persuading Tiberius to repeat his intercession after hearing the legal proposition Capito secured a definitive ruling on the law.

The subsequent history of the desecration of images category suggests that Tiberius' ruling had a very long currency, and that the only inroad into it was when charges began being allowed where the objects desecrated were ‚statuae aut imagines imperatoris *iam consecratae*', to use the language employed by the jurist Venuleius Saturninus in the second century.[79] To some extent Suetonius' catalogue is against this, since it suggests acute dislike engendered by frequent misuse, but the evidence to substantiate this is just not there. The only other identifiable case in which Tiberius was concerned is that of Paulus, the *praetorius* who seized a chamber-pot while wearing a ring impressed with the image of Tiberius, saw Maro, a well-known delator, then and there begin drawing up a charge of *admotam esse imaginem obscenis,* and was only saved by the quick-wittedness of his slave.[80] This information from Seneca makes it certain that there were some successful charges under this category, but it is unfortunate that the date of this case cannot be determined, for it might help to establish the permanence or otherwise of Tiberius' ruling in Ennius' case.

After Tiberius the positive evidence for the invocation of this category is just as uninspiring. Lucan's selection of an unusual site and circumstances for the recitation of Nero's poetry[81] was no doubt akin to *admotam esse imaginem obscenis,* and so was the act of the woman who was sentenced to death for

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[77] Tac. *Ann.* 3.12.4 f. Cf. ch. V at n. 2.

[78] On the relationship see Koestermann, *TA* 1.556.

[79] *Dig.* 48.4.6: ‚qui statuas aut imagines imperatoris iam consecratas conflaverint aliudve quid simile admiserint, lege Iulia maiestatis tenentur.'

[80] Sen. *Ben.* 3.26.1 f.

[81] Suet. *Vit. Luc.*

undressing in front of Domitian's image[82] (who but her *ancilla* could have disclosed it?), but for the rest the only impressive repertoire is that of Caracalla, under whom an *eques* narrowly escaped death for taking a coin with the emperor's image into a brothel and men were condemned for urinating near the emperor's statues, removing garlands from such statues and wearing such garlands as specifics against disease.[83]

There is some negative evidence from which the existence of an active category can be inferred. The main case is that of Dio Chrysostom, against whom charges were preferred on the grounds that he had erected a statue of Trajan within the same precincts as the burial ground of Dio's wife and son. Pliny wrote to Trajan for guidance, and the emperor replied as follows:

> You well know that it is not my policy to secure reverence for my name by the instillation of fear and terror or by charges of *maiestas*. Therefore abandon your investigation, for I would not permit it even if it were supported by precedent (‚quam non admitterem, etiamsi exemplis adiuvaretur').[84]

Trajan's rider on the question of precedent was in reply to a letter from Pliny reporting that he had found the statue in a library, whereas Dio's wife and son were buried in land surrounded by a colonnade, and adding that the enquiry had aroused great interest, being a matter in which the facts were admitted by the defence and supported by precedent.[85] Trajan, however, made it clear that he was not interested in precedents, by which he meant that having abolished charges of *maiestas* there was no possible basis on which the case against Dio could be entertained. But the point is that Pliny would not have been in doubt as to his proper course if he had not been confronted by some history of successful charges in some of the preceding reigns. We may suspect that the main author of that history was Domitian: he was extraordinarily interested in his statues, even to the extent of making one wonder whether he did not perhaps put the *lex maiestatis* to institutional use in their regard.[86]

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[82] Dio 67.12.2. The interpretation of this case by K. H. Waters, ‚The Character of Domitian', *Phoenix* 18 (1964), 49 ff. at 76 is not persuasive.

[83] Dio 78.16.5; *SHA Vit. Carac.* 5.7.

[84] Plin. *Ep.* 10.82.1 f. For the background to Dio Chrysostom's case see G. Sautel, ‚Aspects juridiques d'une querelle de philosophes au IIe siècle de notre ère', *RIDA* 3 (1956), 423 ff.

[85] Plin. *Ep.* 10.81.8: ‚in ea re quae et in confessum venit et exemplis defenditur.'

[86] He allowed no statues of himself to be set up in the Capitol except of gold and silver and of a fixed weight. Suet. *Dom.* 13.2. A sound administrator desiring to check inflation could not have done better than to withdraw precious metal from circulation in this way and to protect his central bank by the *crimen maiestatis*.

There is another matter concerning Trajan's statues. Pliny wrote to the emperor notifying him that recanting Christians had offered worship to a statue of Trajan and to statues of the gods, but this provoked an immediate correction from Trajan: ‚qui negaverit se Christianum esse idque re ipsa manifestum fecerit, *id est supplicando diis nostris*.'[87] Again because of his abolition of charges, Trajan could not allow his own statue to receive *cultus*, for that would virtually have been to invite the protection of his *numen* by the *lex maiestatis* (a statute which did not, of course, play any part in the proceedings against the Christians in Trajan's reign). Pliny's mistake will have been due to his recollection of Domitian's policy on the question of the emperor's statues and *cultus*.

It seems possible to say, on the evidence, that Tiberius' ruling remained in force until Domitian, and that it was then whittled down by making the desecration of *statuae imperatoris iam consecratae* actionable. This would agree very well with the attestation of the *iam consecratae* rule by Venuleius Saturninus: his *floruit* was under Antoninus Pius and the *divi fratres*,[88] which means that the most recent active period of the *lex maiestatis* from which he could have drawn material was, precisely, the reign of Domitian.[89]

3. Asylum

Under A. D. 21 Tacitus notes that members of the lower classes were insulting their betters with impunity by grasping images of the emperor (‚arrepta imagine

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[87] Plin. *Ep.* 10.96.5 f., 10.97.1.

[88] Cf. H. Fitting, *Alter und Folge*, Osnabrück, repr. 1965, 45 f.; Kunkel, *Herkunft* 181 ff.

[89] The link between *imagines imperatoris* and legionary *aquilae* in the Principate raises obvious questions as to the influence of the cult of the *aquila* on various aspects of *imagines imperatoris*. In particular, the sanctuary attaching to the *aquila* (e. g. Tac. *Ann.* 1.39.6 f., where ‚*legatus populi Romani* ... sanguine suo altaria deum commaculavisset' is suspiciously reminiscent of *maiestas p. R. minuta*), the oath by the *signum* (Tertull. *Apol.* 16.8) and the *natalis aquilae* (*ILS* 2293) might shed considerable light on the parallel imperatorial phenomena. One might even envisage illumination for an episode like the *maiestatis eius foeda suggillatio* represented by the loss of the eagles in Germany (n. 144), or for the combined text of Paul and Modestinus discussed in ch. I. But it is doubtful whether any meaningful conclusions about the public criminal law are within reach on the available material. The basic discussion of legionary *imagines imperatoris* is A. v. Domaszewski, ‚Die Religion des römischen Heeres', *Westdeutsche Zeitschrift f. Geschichte u. Kunst* XIV (1895), 1 ff. at 68 ff. Cf. Taeger, 257 and n. 284 with lit.; G. R. Watson, *The Roman Soldier*, London, 1969, 127 ff.

Caesaris'); even freedmen and slaves were intimidating their patrons and owners by threatening words and gestures.[90] The general import of this is that *imagines Caesaris* were being made to furnish some sort of anticipatory right of asylum before and during the perpetration of *iniuriae*, the victims being powerless to interfere because of the charges of *maiestas* that they would face if they did. A debate on the problem was held in the senate on the initiative of C. Cestius Gallus. Cestius declared that although the emperors were godlike ('principes quidem instar deorum esse'), not even the gods heard supplicants unless their causes were just, nor did anyone take refuge in any temple in Rome as a cloak for criminal activities; it was the end of law and order when Annia Rufilla, against whom he had obtained judgment for fraud, was able to abuse and threaten him in public with impunity, confronting him with an *effigies imperatoris* which made it unsafe for him to exercise his legal rights ('neque ipse audeat ius experiri ob effigiem imperatoris oppositam'). Other senators supported him, and at the request of the senate the consul Drusus summoned Annia and imprisoned her.[91]

Annia Rufilla's stratagem would not have worried C. Cestius unless successful invocations of this specialised aspect (in the literary and juristic sources alike – cf. below) of images had already occurred. But there is a matter in which uncertainty arises. Both Tacitus and the legal texts[92] emphasise 'imagines *Caesaris*', 'effigies *imperatoris*', thus suggesting that asylum was generated only by the images of the reigning emperor, and not by those of the Divus. But this needs careful consideration. Suetonius' catalogue includes the case of the man who punished his slave near a statue of Augustus, and there is evidence to support him. For example, in A. D. 22 the senate gave (qualified) recognition to the right of asylum claimed for a *simulacrum divi Augusti* on Crete;[93] in 27 Agrippina and Nero were advised to seek immunity at a statue of Divus Augustus in the Forum;[94] and C. Cestius' description of the emperors as *instar deorum* also points to the inclusion of Divus Augustus in this institution. Moreover, a right of asylum (the first since Romulus) was granted in 42 B. C. to anyone taking refuge in Caesar's shrine,[95] and although no penalty is attested the right must have been effectively sanctioned if the crowds flocking to the sanctuary were so

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[90] Tac. *Ann.* 3.36.1.

[91] Ib. 3.36.2–4.

[92] *Dig.* 47.10.38, 48.19.28.7. See below.

[93] Tac. *Ann.* 3.63.6.

[94] Ib. 4.67.6.

[95] Dio 47.19.2 f. A similar grant for Divus Augustus is (*pace* Mommsen, *Staatsr* 2.760 n. 1) no more than an assumption.

great that it had to be fenced round in order to deny them access; and during the civil war Octavian could not kill the young Antonius until he had dragged him away from the *simulacrum divi Iuli* at which he had taken refuge.[96]

It will be observed that the case for Divus Augustus rests on immovable asylum, on the acquisiton of immunity by going to a shrine or to an immovable statue, but it so happens that this was not the only kind of asylum. Both the legal texts and Tacitus (‚effigiem ... oppositam') attest what may be described as portable asylum, the acquisition of immunity by grasping or brandishing a statuette, medallion or coin, and of the inclusion of the Divus in this category there is not any direct trace. The difficulty is not with such objects bearing Augustus' image as originated during his lifetime, for a reference in a decree to *Caesar* or *imperator* would have covered those easily enough, but when it came to the Divus Augustus series one might have expected express provision in the legislation in order to eliminate all possible doubt: the compilers were, after all, not prevented by any crisis of conscience from including innumerable references to the Divi in the *Corpus Juris,* and their failure to do so in the case of portable asylum is a matter for comment. However, it is not possible to be dogmatic on this subject. Suetonius does attest convictions for taking a *nummo vel anulo effigies (Augusti) impressa* into a privy or a brothel, from which it can be argued that such objects also possessed the power to generate asylum. Furthermore, there is no discernible reason why a distinction should have been drawn between the emperor and the Divus, and in the result it is perhaps better to suppose that the omission of the Divus is accidental and that he and the emperor were on the same footing.[97]

The main importance of the distinction between immovable and portable asylum is that it points the way to a solution of certain problems in the legal texts, and with those texts clarified it will be possible to uncover the important legislation in the middle years of Tiberius' reign on the subject of asylum. The texts in question are as follows:

> Scaevola *lib. iv regularum Dig.* 47.10.38: Senatus consulto cavetur, ne quis imaginem imperatoris in invidiam alterius portaret: et qui contra fecerit, in vincula publica mittetur.
>
> Callistratus *lib. vi de cognitionibus Dig.* 48.19.28.7: Ad statuas confugere vel imagines principum in iniuriam alterius prohibitum est. cum enim leges

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[96] Dio 47.19.3. Suet. *Aug.* 17.5. Romulus had solved a similar problem to that confronting Divus Julius, and in a similar way. Livy 1.8.5 f.

[97] One cannot be altogether sure of this, however. See e. g. the later history of perjury, at nn. 196–202 below.

> omnibus hominibus aequaliter securitatem tribuant, merito visum est in iniuriam potius alterius quam sui defensionis gratia ad statuas vel imagines principum confugere: nisi si quis ex vinculis vel custodia detentus a potentioribus ad huiusmodi praesidium confugerit: his enim venia tribuenda est. ne autem ad statuas vel imagines quis confugiat, senatus censuit: eumque, qui imaginem Caesaris in invidiam alterius praetulisset, in vincula publica coerceri divus Pius rescripsit.

The *senatus consultum* attested by Scaevola is restricted to *imagines imperatoris* and portable asylum, it prohibits the employment of such *imagines* to the detriment of another, and it lays down a penalty of imprisonment. In all these respects it agrees closely with the case of Annia Rufilla, and it is a safe assumption that we have here the decree passed by the senate at the conclusion of that case.[98] This *senatus consultum* extended the *lex Cornelia de iniuriis* – the excerpt from Scaevola appears under the rubric *De Iniuriis et Famosis Libellis*[99] –, and it is possibly another example of the *publicum iudicium* under that *lex* gradually extending its scope.

The excerpt from Callistratus discloses a more complex position. At the end of his discussion Callistratus refers to two separate ordinances, a *senatus consultum* laying down the rule *ne ad statuas vel imagines quis confugiat* and a rescript of Antoninus Pius prescribing imprisonment for *qui imaginem Caesaris in invidiam alterius praetulisset*. There are two important differences between these decrees: the *senatus consultum* speaks of taking refuge at statues or images, whereas the rescript deals with the brandishing of images; and the *senatus consultum* knows nothing of the criterion *in invidiam alterius* which forms the basis of liability under the rescript. The curious part about these ordinances is that a rule on all fours with the *senatus consultum* described by Scaevola – so much so that even the unusual ‚in *invidiam* alterius' is retained – is allocated by Callistratus to a rescript, while the *senatus consultum* to which he refers deals with a different rule altogether. To make matters worse, if Antoninus Pius had issued a rescript restating the *senatus consultum* of A. D. 21 Scaevola ought to have known that a rescript was now the source of the rule, for he flourished an appreciable time after Pius' death.[100] The obvious explanation is that Callistratus

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[98] Cf. Rogers, *Trials* 60.

[99] In this respect it differs from the excerpt from Callistratus. For the reasons see below.

[100] He was a member of Marcus' *consilium*. Kunkel thinks that it was after his term as *praef. vigilum* (A. D. 175) that he became a *consiliarius*. *Herkunft* 217; *Roman Leg. and Const. Hist.* 110. His *claruit* is placed between Marcus and Septimius by Lenel, *Palin.* 2.215. Fitting, *Alter u. Folge* 63 f. is to substantially the same effect as Kunkel.

has got his ordinances transposed, but one would not lightly assume such a mistake for any classical jurist, even in a passage as confused – in the first part (‚Ad statuas ... tribuenda est') [101] – as this excerpt apparently is. In any event Callistratus' *senatus consultum* does not look like a measure originating in Antoninus Pius' reign. Pius is known to have issued a rescript on the question of *ad statuas confugere*, but it was a measure making such asylum possible in certain circumstances, namely where a slave sought refuge from ill-treatment, and not a measure imposing a prohibition.[102] There is therefore ample room for the suggestion that the prohibitory *senatus consultum* attested by Callistratus originated at some earlier date, and that Pius relaxed the rule in the case of ill-treated slaves.[103]

Callistratus has thus preserved the details of a *senatus consultum* which imposed an absolute ban, and not merely one dependent on *in invidiam alterius*, on seeking refuge at statues or images (there is no restriction to *Caesar* or *imperator* here). There is evidence to identify this decree. Tacitus informs us that in A. D. 27 Agrippina and Nero were advised either to flee to the German armies or to embrace the statue of Divus Augustus in the Forum at the busiest hour of the day and to call on people and senate for aid: ‚perfugere ad Germaniae exercitus vel celeberrimo fori effigiem divi Augusti amplecti populumque ac senatum auxilio vocare.' [104] Tacitus attributes this advice to *agents provocateurs* and says that although Agrippina and Nero did not act on it, it was subsequently – at their trial in A. D. 29 – laid at their door as if they had.[105] Suetonius is to a similar effect with his assertion that Tiberius falsely charged Agrippina with conspiring [106] to seek refuge at Augustus' statue or with the armies, and relegated her for it: ‚calumniatus modo ad statuam Augusti modo ad exercitus confugere

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[101] The distinction between the *s. c.* and the rescript in the last part of the excerpt is not reflected in the earlier part, where contamination of the two decrees is likely.

[102] On Pius' rescript cf. Gaius 1.53, *Coll.* 3.3.1 ff., *Inst.* 1.8.2, *Dig.* 1.6.2. Gaius says the rescript applied to *ad fana deorum confugere* as well as to *ad statuas principum confugere*, but the other sources quote the *ipsissima verba* of the rescript to Aelius Marcianus and have neither *ad fana deorum* nor *principum*. It is possible that the later Christian asylum precipitated the deletion of *ad fana deorum*, but in fact Gaius is far too general to outweigh the verbatim citations. Mommsen's explanation, *Strafr* 461 n. 3, of *ad fana deorum* depends on his theory that Gaius was a provincial jurist, on which see Kunkel, *Herkunft* 186.

[103] Pius may, of course, have restated the general prohibition at the same time as he allowed this relaxation, but that would not affect the argument.

[104] Tac. *Ann.* 4.67.6.

[105] Ib.

[106] This is plainly the meaning of *velle* here. Cf. Bauman, *Lex Quisquis* 50 ff. on *cogitare*.

velle, Pandatariam relegavit.'[107] The reason why Suetonius accuses Tiberius of *calumnia* is not because the plan to seek refuge was not proved, but because seeking refuge was not a crime at the time of Agrippina's entertaining the plan in A. D. 27. It became a crime at her trial, when the senate laid down the rule *ne ad statuas vel imagines quis confugiat.* As for the particular crime that it became, the new category was subsumed under the *lex maiestatis:* what Agrippina and Nero had planned was quite clearly incitement to sedition, and not merely insulting behaviour. The *lex maiestatis* was being used to check abuses of the *lex maiestatis.*

The *senatus consultum* which was issued at the conclusion of the trials of Agrippina and Nero in A. D. 29 may have had a much wider scope than *ne ad statuas vel imagines quis confugiat,* in as much as it may have abolished the right of immovable asylum altogether. That there was such an abolition at some time during Tiberius' reign is attested by Suetonius: ‚abolevit et ius moremque asylorum, quae usquam erant.'[108] Mommsen thought that this was the same decree as a measure attested by Tacitus for A. D. 22 – ‚facta senatus consulta, quis multo cum honore modus tamen praescribebatur, iussique ipsis in templis figere aera sacrandam ad memoriam, neu specie religionis in ambitionem delaberentur'[109] –, but the identification is by no means secure. Tacitus is describing not a single decree of general application but a number of special decrees (‚senatus consulta'), and they are the licensing decrees for a large number of temples and shrines in the senatorial provinces of Asia, Cyprus and Crete whose claims to the right of asylum were investigated by the senate in A. D. 22.[110] This has nothing to do with the problems of asylum in Rome itself, which is where the abuses that troubled C. Cestius had been rife the previous year, and *a fortiori* it is not the *quae usquam erant* attested by Suetonius. Moreover, as late as A. D. 23 Samos and Cos were given a hearing on the rights of asylum which they claimed,[111] a hearing that they could not have been given if there had already been a general abolition of asylum. There are thus reasonable grounds for dating the general abolition attested by Suetonius to A. D. 29.[112]

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[107] Suet. *Tib.* 53.2.

[108] Ib. 37.3.

[109] Tac. *Ann.* 3.63.7. On the supposed identification see Mommsen, *Strafr* 460 n. 1.

[110] Tac. *Ann.* 3.60 ff., 4.14.1 ff.

[111] Ib. 4.14.1 ff.

[112] Kornemann's suggestion, 144 and n. 38, that Suetonius is referring to an abolition in the imperial provinces and Egypt does not account for *quae usquam erant.* – Given that the abolition has to be later than 23, no date other than 29 commends itself unless the whole matter is arbitrarily removed from Tiberius' reign.

For some reason sanctuary seems to have again become controversial in A. D. 69. Tacitus notes that Titus Vinius fell to his assailants ‚ante aedem divi Iulii', [113] which presumably means that he was seeking sanctuary there (it was of course difficult to get in). Otho's conscience was uneasy about Vinius, since he had been his *amicus*, [114] and the contrast between this and the death of Licinianus Piso is instructive. Piso was hidden by a public slave in the latter's quarters in the temple of Vesta, and this delayed his death. Tacitus insists that that was due to the obscurity of the refuge and not to religious considerations, although whether he means that such considerations were ruled out by the Tiberian *senatus consultum* it is not possible to say; at all events, Otho sent soldiers who eventually dragged Piso out and killed him ‚in foribus templi', [115] thus following the precedent of Octavian and the young Antonius and suggesting that religious considerations may not have been entirely extinct. Otho put a bold face on it and declared it ‚ius fasque' to have killed Piso, since the latter was his *inimicus et aemulus*, [116] but one suspects that there is special pleading here, possibly reflecting an enquiry by the senate into Otho's violation of sanctuary before voting him his offices and titles. [117] Furthermore, Vitellius subsequently discovered 120 *libelli* claiming rewards for their authors' contributions to the killing of Vinius and Piso, and it is not without significance that Vitellius caused the claimants to be sought out and executed. [118] Finally, there may be a distant echo of the events of 69 in the special point made by the *Augustan History* of the fact that Patruinus was killed ‚ante templum Divi Pii'. [119] It is not possible, however, to do much more than note these incidents, for there is no direct trace of the repeal of the Tiberian decree.

There is a slight trace of portable asylum, in the reign of Nero. Agrippina, seeking to reassert her influence over Nero, is portrayed by Tacitus as ‚intendere manus, aggerere probra, consecratum Claudium ... invocare'. [120] This is reminiscent of Tacitus' language in his preface to the Annia Rufilla case, and it is possible to suppose that there had been a progression from the now forbidden *effigiem portare* to the purely notional *divum invocare* as a means of creating asylum. Words were protecting words. There may be a distant reflection of this

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[113] Tac. *Hist.* 1.42 i. f.
[114] Ib. 1.44.
[115] Ib. 1.43.
[116] Ib. 1.44.
[117] Cf. ib. 1.47 on the meeting of the senate.
[118] Ib. 1.44 i. f.
[119] *SHA Vit. Carac.* 4.2.
[120] Tac. *Ann.* 13.14.6.

doctrine in an incident in Caracalla's reign, when the emperor shielded L. Fabius Cilo by holding his *paludamentum* before him and calling on the soldiers not to insult the emperor's father or strike his tutor.[121] In case the emperor's *numen* did not suffice, asylum was also being generated by *divum Severum invocare.*

4. Provincial misconduct

In A. D. 22 charges were brought against C. Silanus, a former proconsul of Asia. Tacitus' account of the charges is as follows:

> C. Silanum pro consule Asiae, repetundarum a sociis postulatum, Mamercus Scaurus e consularibus, Junius Otho praetor, Bruttedius Niger aedilis simul corripiunt obiectantque violatum Augusti numen, spretam Tiberii maiestatem.[122]

There are two distinct phases here. In the first, charges were laid by the provincials, and it was in respect of those charges that Silanus' former quaestor and legate later joined the ranks of the accusers.[123] The second phase saw the advent of Scaurus, Otho and Niger with the charge of *violatum Augusti numen, spretam Tiberii maiestatem.*[124]

It has been too readily assumed in the literature that the *violatum numen* was simply a repetition of the false oath in Rubrius' case and the *spretam maiestatem* some unknown offence against Tiberius,[125] and this failure to grasp the full import of the charge has resulted in the obscuration of a most instructive case. There is nothing in *violatum numen* making it inherently a case of perjury, and still less is there any indication by Tacitus that a fresh attempt to achieve what had not been achieved in A. D. 15 was being made. Tiberius' ruling in Rubrius' case had in all probability disposed of the link between the Divus and perjury for all time,[126] but even if there were subsequent attempts to establish a connection they surely did not occur under Tiberius.

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[121] Dio 77.4.4.

[122] Tac. *Ann.* 3.66.2.

[123] Ib. 3.67.1.

[124] Cf. Koestermann, *Majestät* 103. Contra Bleicken, 159, arguing that the *maiestas* charges were only incidental. In fact they were fundamental. See below.

[125] So Rogers, *Trials* 67: ‚Accusations of *maiestas,* that Silanus had broken an oath by the divinity of Augustus and offended against Tiberius' majesty.' Cf. Furneaux, 1.275; Bleicken, loc. cit. Taeger, 221 is interested in the *numen* but not in the *violatum.*

[126] Cf. at nn. 196–202 below.

Tacitus continues his account with the observation that although there was no doubt that the accused was guilty of *saevitia* and *captae pecuniae*, many features of the trial would have intimidated even an innocent man. He notes especially the many senators hostile to Silanus, the team of expert speakers from Asia, the fact that Silanus was conducting his own defence and the deadly cross-examination by Tiberius.[127] Tacitus then says that Silanus' slaves had been sold to the *actor publicus* in order to be examined under torture, and adds that charges of *maiestas* were introduced into the case in order to deprive Silanus of the services of counsel:

> Servos quoque Silani, ut tormentis interrogarentur, actor publicus mancipio acceperat. et ne quis necessariorum iuvaret periclitantem, maiestatis crimina subdebantur, vinclum et necessitas silendi.[128]

In the face of these difficulties Silanus requested a postponement, wrote Tiberius a letter of mingled reproach and entreaty, and abandoned his defence.[129] The continuation of the trial having been thus rendered unnecessary, the senate addressed itself to the question of sentence. Tiberius, in order to fortify what he had in mind by a precedent, ordered Augustus' *libelli* concerning Volesus Messalla, proconsul of the same province of Asia, and the *senatus consultum* that had been issued against Messalla to be read:

> Tiberius quae in Silanum parabat, quo excusatius sub exemplo acciperentur, libellos divi Augusti de Voleso Messalla eiusdem Asiae pro consule factumque in eum senatus consultum recitari iubet.[130]

L. Piso was asked for a motion on sentence and moved an *aquae et ignis interdictio* and relegation to Gyarus. Cn. Lentulus proposed that the property of Silanus deriving from his mother be exempted from confiscation; Tiberius agreed to this, but proposed Cynthus as a less forbidding place of exile than Gyarus.[131]

The main factors in this case are the assertion that Silanus' slaves were sold in order to be examined, the allegation that *maiestas* was charged in order to deprive him of counsel, the admission that he was guilty of *saevitia* and *captae pecuniae*, the citation of Messalla's case as a precedent, the sentence and – a factor that we now notice for the first time – the debate on whether there should

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[127] Tac. *Ann.* 3.67.2.

[128] Ib. 3.67.3.

[129] Ib. 3.67.4.

[130] Ib. 3.68.1.

[131] Ib. 3.68.1–69.8. H. W. Bird, ‚L. Aelius Seianus and his political influence', *Latomus* 1969, 61 ff. at 74, avers that Silanus committed suicide but does not cite any authority for this proposition.

be a *receptio inter reos* in respect of the *maiestas* charges. Tacitus reports this debate as follows:

> Corripiunt obiectantque ... spretam Tiberii maiestatem, Mamercus antiqua exempla iaciens, L. Cottam a Scipione Africano, Servium Galbam a Catone censorio, P. Rutilium a M. Scauro accusatos. videlicet Scipio et Cato talia ulciscebantur, aut ille Scaurus.[132]

Mam. Scaurus' precedents for his *maiestas* charges were thus the ancient trials of L. Aurelius Cotta in 138 B. C., Ser. Sulpicius Galba in 149 and P. Rutilius Rufus in 92.[133] All three had been charged *de repetundis*, but why did Scaurus need any precedents for *repetundae*, a *crimen* which had received more than enough legislative attention both in the late Republic and under Augustus[134]? and if he did need a precedent for any reason, why did he select such vintage models? The answer is that these cases were not, and in view of the changes in the *lex repetundarum* since 92 B. C.[135] could not have been, cited in support of the charges of *captae pecuniae*, of improper receipt of money, at all. They were cited in support of the other factual issue disclosed by Tacitus – *saevitia*. So much is certain in the case of the Galba precedent,[136] but unless it is also surmised for Cotta and Rutilius[137] there is no common basis for Scaurus' citation of the three cases.

Saevitia in socios had a long Republican connection with *maiestas p. R. minuta*,[138] and the connection had been uppermost in the minds of those trying Galba, Cotta and Rutilius.[139] The same notion lay at the foundations of Mam.

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[132] Tac. *Ann.* 3.66.2 f.

[133] The sources for Cotta are Cic. *In Caec.* 69, *Pro Mur.* 58, *Brut.* 81, *Pro Font.* 38; Livy *Per. Oxy.* 55; Val. Max. 8.1.11; App. *B. C.* 1.22. On the date see E. Badian, ‚Mam. Scaurus cites precedent', *CR* N. S. 8 (1958), 216 ff. at 216 and n. 4. On the sources for Galba and Rufus see Broughton, *MRR* 1.457, 2.8. For a useful discussion of Galba's case see W. Eder, *Das vorsullanische Repetundenverfahren*, Bonn, 1969, 51 ff.

[134] On the Republican *leges* and the Augustan *s. c. Calvisianum* see Brunt, 189 n. 1 and pass.; Bleicken, 36 ff.

[135] Cf. n. 134. To take only one example, the tariff for restitution fluctuated greatly. Mommsen, *Strafr* 727 ff.; Brunt, 194 f.

[136] See the sources cited by Broughton, *MRR* 1.457.

[137] On Cotta's record (Badian, o. c. 216 f.) *saevitia* is not a difficult assumption. There were seven ampliations before he was acquitted. Val. Max. 8.1.11. Rutilius, the prototype of the injured innocent (Broughton, *MRR* 2.9 n. 2, Badian, o. c. 218), is less easy, but once his condemnation is secure it might just as well have been for a sheep as for a lamb.

[138] Bauman, *CM* 11, 21 n. 11, 22 f., 30 ff., 79 f. Cf. Cic. *In Verrem* pass. See also *Dig.* 48.4.4 pr.: ‚utve ex amicis hostes populi Romani fiant.'

[139] The *maiestas* implications of Galba's conduct are brought out by all the sources (n. 133) but especially by Appian *Ib.* 60: οὐκ ἀξίως δὲ Ῥωμαίων μιμούμενος βαρβάρους.

Scaurus' argument, except that instead of calling it *maiestas p. R. minuta* he called it *violatum Augusti numen, spretam Tiberii maiestatem.* Hence Tacitus' caustic assertion that men like Scipio, Cato and Scaurus (*cos.* 115) would not have stooped to such charges. On the face of it this comment does not make sense, since Cato certainly and the others very probably had relied on *saevitia,* but it makes excellent sense in the light of the one possible difference between the precedents and Silanus' case – the expression of Divus Augustus' violated *numen* and Tiberius' spurned majesty as functions of *maiestas p. R. minuta.*

It can now be seen why Volesus Messalla's case was cited as a precedent by Tiberius. L. Valerius Messalla Volesus, proconsul of Asia in A. D. 11 or 12,[140] had executed 300 provincials in a single day and had celebrated the achievement with an exultant (in Greek) ‚O rem regiam!',[141] and there can be no doubt that this formed the gravamen of the charges that were brought against him in the senate.[142] That his conduct earned him a sentence of interdiction and confiscation is guaranteed by Silanus' sentence, and that the charge against him was *maiestas* is equally secure: there would have been little point in citing the Augustan *libelli* and *senatus consultum* against Silanus, whom we know to have been charged with *maiestas,* if those documents had merely been concerned with a capital penalty under the *lex repetundarum* (assuming that such a penalty existed at all[143]).

But to Mam. Scaurus the crucial case was Cotta, since he cited it out of chronological order. It is certain that Cotta was tried by the *quaestio de repetundis* as far as the *captae pecuniae* part of his case was concerned (contra presumably Eder, o. c. 66 ff., 101 ff., 119 ff., but see Bauman, Review of Eder, *Gnomon,* 1971, 216 ff.). Val. Max. 8.1.11 attests Cotta's trial *apud populum,* but there is no conflict. The *lex Acilia* (*FIRA* 1.84 ff.) made no provision for the trial of *saevitia,* it is a safe assumption that the earlier *leges de repetundis* were equally silent, and the assembly will have been the only forum in which this part of the case could be ventilated. The fact that there was such a trial strengthens the likelihood that there were charges of *saevitia.*

[140] Koestermann, *TA* 1.552.

[141] Sen. *De Ira* 2.5.5.

[142] For the view that the trial was in the senate see Brunt, 200 f.; Bleicken, 35 n. 3. Contra Kunkel, *Senat* 38 f., arguing for the *quaestio de repetundis* although bringing the senate into it by way of a *s. c.* intensifying the statutory penalty. Kunkel's main point, that ‚Saturninus Furius, qui Volesum condemnavit' (Sen. Rhet. *Contr.* 7.6.22) was not a senator, may be perfectly true, but neither were ‚facundissimi totius Asiae' who took part (Tac. *Ann.* 3.67.2) in the undoubtedly senatorial trial of Silanus.

[143] For a valuable review of the literature see Bleicken, 37 ff., for later additions Eder, o. c. 91 n. 1, 94 n. 1, and for some pertinent comments Brunt, 197, 202 ff. The writer's position is that the cases of Messalla and Silanus confirm the non-capital nature of the process *de repetundis.*

Whose *maiestas* was diminished by Messalla's act, that of the *populus Romanus* or that of Augustus himself? *Saevitia in socios* may seem remote from *iniuria principis,* but some assistance is furnished by a passage in the elder Pliny: ‚Variana clades et maiestatis eius foeda suggillatio.'[144] P. Quinctilius Varus was the official scapegoat for the German disaster of A. D. 9,[145] and if he had survived would very possibly have been arraigned for his incompetence, on the same doctrine of *male gesta re publica* as those guilty of *saevitia,* as unsuccessful commanders had so often been in the past.[146] Pliny's *maiestatis eius foeda suggillatio* evidently goes back to A. D. 9, and as there were some survivors of the disaster and much adverse comment on their conduct,[147] it is not impossible that charges of *maiestas* were brought against some of them. If so, such charges will have established the doctrine that the defilement of Augustus' majesty by the *male gesta re publica* of imperial officials was capable of generating the *crimen maiestatis p. R. minutae,* and it may have been felt subsequently, in A. D. 12 or 13,[148] that this doctrine could properly be extended to a province such as Asia which, although senatorial, may have had its governor appointed by the emperor.[149] One of the factors that may have assisted such an extension is the group of rules of the *lex Julia maiestatis* making it *maiestas* to do certain acts in the provincial and external spheres *iniussu principis*,[150] and so defining the emperor's powers by defining a *maiestas* category. Those rules originally reflected the new provincial arrangements of 27 B. C.,[151] but they gained empire-wide currency by 23 B. C. at the latest,[152] and it can be postulated with some confidence that if certain acts falling within the sphere of provincial administration were allocated to the emperor's discretion, then although their performance *iniussu principis* was technically *maiestas p. R. minuta* the notion may rapidly have gained ground that what was really involved was the personal majesty of

[144] Plin. *N. H.* 7.150.

[145] Syme, *RR* 511 and n. 2.

[146] Bauman, *CM* 22, 36 ff., 42 ff.

[147] Vell. 2.120.3 f.

[148] Messalla's trial is dated to A. D. 12 by Brunt, 203 and to 13 by Bleicken, 35 and n. 2.

[149] Cf. Syme, *RR* 406 and n. 3.

[150] E. g. *Dig.* 48.4.1.1: ‚quo obsides iniussu principis interciderent.' This is not (*pace* Cloud, 212 f.) an interpolation. Why should it not have been *maiestas*? *Dig.* 48.4.3: ‚qui iniussu principis bellum gesserit dilectum habuerit exercitum comparaverit.' Cf. *PS* 5.29.1: ‚iniussu imperatoris.' Kübler, 550 reads *populi Romani* for *principis,* but if *principis* is wrong in the classical period that is all the more reason for accepting the *PS* version, which except for the one word agrees closely with *Dig.* 48.4.3.

[151] Bauman, *CM* 271 ff.

[152] Ib. 278.

the emperor; and from thinking in this way of acts performed *iniussu principis* to thinking in the same way of acts performed with authority, but incompetently or oppressively, was not a difficult transition.[153]

In Silanus' case a further link was forged by associating the crime with Augustus' *acta*. The *libelli divi Augusti* which Tiberius ordered to be read out in conjunction with the *senatus consultum* against Messalla[154] were not the formal *libellus inscriptionis* that had initiated the prosecution in Messalla's case – the emperor never appeared as an accuser[155] –, but even as a document exposing Messalla's crimes *(maiestatis meae foeda suggillatio?)* and laying down guidelines for the senate they were part of Augustus' *acta*. And as Tiberius had said in A. D. 15, *infringere dicta eius* was an act of impiety.[156] Citation of Augustus' *libelli* at Silanus' trial may not have been strictly necessary, once a *senatus consultum* giving effect to Augustus' directions had ensued, but the *libelli* were an invaluable adjunct to the accusers' case. It is just possible that there was yet another reason for the citation. The position of Augustus' *acta* as a result of *deorum iniuriae dis curae* was still insecure – even in A. D. 25 Tiberius would find it necessary to reinforce his *infringere dicta eius* pronouncement[157] –, and it may have been felt that by reading the *libelli* into the record of Silanus' case the *senatus consultum* against Silanus would, in effect, reaffirm and adopt the *libelli*. The senate would thus give its imprimatur to Augustus' *acta*, it would establish the new god as part of the machinery of criminal justice and would thus validate his constitutional position. And it would do all this in the highly desirable cause of better provincial government, not dubiously on behalf of false oaths or mutilated statues.

Spretam Tiberii maiestatem must also have been connected with Silanus' *saevitia*, seeing that Mam. Scaurus' precedents were cited in support of both heads of accusation, but the reasons for adding this head are less obvious. By allowing his *maiestas* to be linked with Augustus' *numen* Tiberius was abandoning the sharp distinction between the god and himself that he had insisted on drawing in Appuleia Varilla's case, and it may be supposed that this was because the link was a more concrete one here. If more were known about

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[153] Under the Republican *crimen* both unauthorised and incompetent or oppressive acts fell under *male gesta re publica*. Cf. Bauman, *CM* 20 ff., 25 f., 26 n. 18, 75 f., 110.

[154] Tac. *Ann.* 3.68.1.

[155] Avonzo, *Senato* 80 f. also believes that these were not the *libelli* initiating the prosecution, but on the erroneous ground that there was no such thing as a written accusation in the senatorial criminal process.

[156] Cf. at n. 65.

[157] Cf. at n. 66.

Tiberius' position in the last years of Augustus[158] it might be possible to say that the *collega imperii* was looked upon as a participant in the *acta* of the senior incumbent, especially if – as seems likely – the *libelli* against Messalla were in fact the work of Tiberius rather than of the ailing emperor. Perhaps Scaurus, who gave an extraordinary amount of thought to the preparation of his indictment in this case,[159] deemed it prudent to cover both the nominal and the actual authors of the *libelli*.

It remains to clarify Tacitus' assertion that Silanus' slaves were sold in order to be interrogated and that charges of *maiestas* were joined in order to deprive him of counsel. The tenses used by Tacitus for the sale ('acceperat') and the joinder of *maiestas* charges ('subdebantur') are most important, for they suggest that the slaves were sold *before* the *maiestas* charges were joined, and therefore at a stage when it was still a straightforward case of *captae pecuniae* under the *lex repetundarum*. Is this sequence artificial, or does it reflect the true order of events? At first sight the location of the passage is most awkward. We have had the lodgement of the charges of *captae pecuniae* and *maiestas* and the debate on the latter, the accession of Silanus' former quaestor and legate to the ranks of the accusers, Tacitus' admission that the accused was guilty of *saevitia* and *captae pecuniae*, and what appears to have been an actual hearing in the senate[160] – and now we are suddenly confronted by the *servorum quaestio* and the joinder of *maiestas*. There is also the peculiar 'igitur ... defensionem sui deseruit'[161] with reference to Silanus' abandonment of his defence. Why *igitur?* Because his slaves had been sold (cf. Libo Drusus), or because *maiestas* had been joined? Our first impression is that it is neither, but the whole series of prejudicial events of *Ann.* 3.67.2 culminating in Tiberius' hostile cross-examination. But facile dismissals of Tacitus are seldom wise, and it is worth asking whether he does not perhaps mean what he says, namely that the sale and the joinder of *maiestas* were the last straw. Or to be more precise, in view of 'acceperat, subdebantur', does he mean

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[158] On Tiberius' powers in this period see Timpe, 27 ff.; Paladini, 'I poteri di Tiberio Cesare dal 4 al 14 d. C.', Hommages à Marcel Renard II (1969), 573 ff. Cf. the assertion by Syme, *Tacitus* 1.410 that after Augustus' death and the addition of only the oath of allegiance to what he already held, 'if (Tiberius) did not intend to continue in the power, he would have to abdicate'.

[159] When Badian, o. c. 219 dismisses Scaurus as a lazy incompetent he overlooks three things: Tacitus' evaluation of Scaurus, *Ann.* 6.29.4, as 'insignis nobilitate et orandis causis'; the great ingenuity of the *maiestas* charges; and the fact that those who worked on the case included the able Bruttedius Niger (*Ann.* 3.66.5 f.) and the flower of Asian oratory (*Ann.* 3.67.2).

[160] This is made almost certain by the scene described in Tac. *Ann.* 3.67.2.

[161] Ib. 3.67.4.

that the sale of the slaves was innocuous as long as the charges were for *captae pecuniae* but became dangerous when *maiestas* was added? Is it possible, in other words, to envisage the following sequence: the lodgement by the provincials of charges of *captae pecuniae;* the negotiation by someone of a sale of the slaves with a view to accomplishing by circumvention what could not be accomplished (in *repetundae* cases) direct; the lodgement (but not yet the acceptance) of Scaurus' charges of *maiestas;* the relative unconcern of Silanus at this, knowing that without the slaves' evidence *saevitia* could not be brought home to him[162] and confident that subterfuge would not succeed in getting the evidence in; the commencement of the trial on the *captae pecuniae* charges, or the holding of a pre-trial *interrogatio* on the proposed *maiestas* charges,[163] and in either event the extraction from Silanus of sufficient evidence of *saevitia* to justify the reception of the *maiestas* charges;[164] the realisation by Silanus that there was no further barrier to the admission of the slaves' evidence and his decision to throw in the towel? One cannot be positive about such a sequence, and in any case some therapy would still be required, for Tacitus cannot be heard to say that the sole purpose of the *maiestas* charges was to deprive the accused of counsel, nor does the undefended Silanus of *Ann.* 3.67.2 ring true if he was appearing at that time on the *captae pecuniae* charges.[165] But these are minor inconveniences compared with the rejection of the sale and joinder passage altogether, or its arbitrary allocation to some other part of the narrative.[166]

5. Imperial solidarity

In A. D. 25 charges were brought against A. Cremutius Cordus, the accusers being Satrius Secundus and Pinarius Natta, two henchmen of Sejanus. The charge, according to Tacitus, was the unprecedented one of publishing *Annales* praising (or citing[167]) Brutus and calling Cassius ‚the last of the Romans': ‚novo ac tunc primum audito crimine, quod editis annalibus laudatoque M. Bruto C.

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[162] This is a necessary inference from the fact that the slaves' evidence was sought by the accusers. If they could have managed without it they would have done so.

[163] Cf. ch. VIII n. 126.

[164] On the joinder of charges at any stage of a senatorial trial see Avonzo, *Senato* 86 f.

[165] On the denial of representation where the charge was *maiestas* see Bauman, *Lex Quisquis* 55.

[166] See for example Rogers, *Trials* 68.

[167] Cf. Cramer, *Bookburning* 194 n. 170; Koestermann, *TA* 2.118.

Cassium Romanorum ultimum dixisset.' Cordus delivered a speech in reply to the charges, but the patent hostility of Tiberius disheartened him and after leaving the senate he proceeded to starve himself to death. The senate ordered that his books be burnt.[168]

The salient points of Cordus' speech, as recounted by Tacitus,[169] are as follows:

> It is my words that are attacked, so innocent am I of deeds. But those words were not aimed at the emperor or his parent, whom the *lex maiestatis* embraces. I am said to have praised Brutus and Cassius, but many have spoken well of them without suffering for it. Caesar did not resent Cicero's praise of Cato or the poems of Bibaculus and Catullus, nor Augustus the letters of Antony or the speeches of Brutus. The Divi tolerated such things, thus displaying both forbearance and wisdom. The Greeks were tolerant of attacks on those whom death had placed beyond censure or praise. I am not stirring up the populace to take up arms on behalf of Cassius or Brutus, both dead these many years; all I claim is the right to remember them as an historian.

Reactions to this speech range from its rejection as a free composition[170] to indignation at the picture of Tiberian censorship that it presents,[171] but what seems to have been largely overlooked is that the leader of the Roman Bar in the early second century (and a former *maiestas* judge[172]) has here set out, if not Cordus' actual defence, his own ideas on what constituted a proper answer to a charge of verbal treason; the former seems more likely and will be assumed here,[173] but the information is no less valuable if it merely reflects Tacitus' professional opinion. We note especially the suggestion that tolerance was a noteworthy attribute of the Divi – almost a reminder to Tiberius that he was bound by the *acta* of Divus Augustus; the contention that the dead were not defamable – a valid postulate for the *actio iniuriarum*[174] and in Tacitus' opinion

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[168] Tac. Ann. 4.34.1 f., 35.5. Cf. Dio 57.24.3; Suet. *Tib.* 61.3; Sen. *Ad Marc.* 1.3.

[169] Tac. *Ann.* 4.34.2–35.4.

[170] Ciaceri, 296; Cichorius, *RE* 4.1703; Syme, *Tacitus* 1.337 and n. 10, 2.517; Koestermann, *TA* 2.119. But Rogers, *Trials* 86 f. does not unequivocally reject the speech.

[171] Cramer, *Bookburning* 191 ff.

[172] Tac. *Agric.* 45: ‚nostrae duxere Helvidium in carcerem manus; nos Mauricum Rusticumque divisimus, nos innocenti sanguine Senecio perfudit.'

[173] See below on the apposite submissions of law that Tacitus has Cordus make. The speech need not have been delivered at the trial. There need not even have been a trial: the occasion could have been a debate on a *receptio inter reos*. Nor is there any need to defend the whole speech; the submissions of law occupy only a small part of the account.

[174] Mommsen, *Strafr* 785 f.

for aggravated injury as well; and the denial of seditious intent – an attempt to return verbal treason to its origins.

The crucial contention by Cordus is that his words were not aimed at Tiberius or Augustus, whom the *lex maiestatis* embraced: ‚sed neque haec in principem aut principis parentem, quos lex maiestatis amplectitur.'[175] The point being made was that whereas no case was known in which Divus Julius had managed to qualify for subsumption under the *lex*, Divus Augustus had succeeded in doing so in Appuleia Varilla's case; Tiberius, of course, came in under *aliquorum*. This leads to the most likely interpretation of the charge, which is that praise of Caesar's murderers was derogatory of Caesar under the *quo agnosci possit* category, the libel aimed at someone who was not named but could be recognised.[176] But Divus Julius was not eligible, and the accusers claimed that in fact the unnamed victims were Divus Augustus and Tiberius. As to how the identification of these victims was established, Dio's version of the case may help. He says that Cordus, having done nothing wrong, was tried for the history of Augustus which he had written long before and which Augustus had read (or heard recited);[177] the charges were that Cordus had praised Brutus and Cassius, had adhered to senate and people (= supported the Republic[178]) and, without maligning Caesar or Augustus, had not gone out of his way to exalt them.[179] To this may be added the little that can be gathered about Cordus' work from other sources. It is said to have been hostile to the triumvirs and not particularly favourable to Augustus as emperor[180] and, above all, to have had a rather curious publishing history: a copy having been saved from destruction by Cordus' daughter, the work was republished by order of Caligula, but the new edition was only in the form of an abridgement and even then was noted for its *audaces sententiae*.[181] In short, the work was an attack on the Principate and its founder, and it was on the strength of such evidence[182] that Divus Augustus

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[175] Tac. *Ann.* 4.34.3.

[176] Cf. ch. II, Passages D, F and the discussion there.

[177] A recital is more likely. Cf. Suet. *Tib.* 61.3: ‚Augusto audiente recitata.'

[178] Cf. Klingner, *Mus. Helv.* 15 (1958), 197 f.

[179] Dio 57.24.3.

[180] See the fragments in Peter, *HRR* 2.89.4, 87.1. Add Sen. *Ad Marc.* 26.1: ‚illo ingenio ... quo proscribentis in aeternum ipse proscripsit.'

[181] Sen. *Ad Marc.* 1.3; Tac. *Ann.* 4.35.5. Suet. *Cal.* 16.1. Quint. *Inst. Orat.* 10.1.104: ‚habet amatores nec immerito Cremuti libertas, quanquam circumcisis quae dixisse ei nocuerat. sed elatum abunde spiritum et audaces sententias deprehendas etiam in his quae manet.'

[182] It need not be supposed that the charge itself went any further than Tacitus' version. It was typical of Roman accusationary draftsmanship to specify only part of the

was identified as the subject of attack. Moreover, Augustus' *acta* included the *lex Pedia* for the punishment of Caesar's murderers and he had made much of that *lex* in *Res Gestae*,[183] so that there was also a question here of denigration of his *acta* and *infringere dicta eius*. As for Tiberius, he presumably came into it by reason of the general attack on the Principate as an institution, although it must be admitted that without Divus Augustus there could scarcely have been a viable charge. Which, of course, lends added weight to the significance of the Divus as an institutionalising factor in the early Principate.

An additional ground of accusation can be extracted from Tacitus' account of the charge if *laudato M. Bruto* is taken to mean ‚that he had cited Brutus (as having praised Cassius)'[184] for we might have here the origin of the rule that the citation of someone condemned for treason was a reflection on the condemning authority. Such a rule seems to be clearly visible in Pliny's description of the capital danger to which he was exposed when M. Aquilius Regulus, his inveterate enemy amongst his professional colleagues, pounced on his citation of an opinion of Mettius Modestus, a jurist who had been exiled by Domitian, and suggested that by citing the opinion Pliny had questioned the verdict on Modestus' loyalty[185] – plainly a case in which a charge of *laudato M. Modesto* was held over Pliny's head in an attempt to force him to abandon the citation.[186] It is possible, however, that this rule was much older than Cremutius Cordus' case and went back to a somewhat different doctrine, for there was perhaps no difference in principle between citing the *hostis* and disregarding the *memoriae damnatio* pronounced against him in any other way – for example, by exhibiting his images, as had been done in 98 B. C.[187] But on balance a reflection on the condemning authority seems more likely.

One curious aspect of the case remains to be noticed. Cordus' *Annales* had been read by (or to) Augustus, and presumably approved of by him, yet it

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case in the indictment and to leave the rest to evidence and argument at the trial. Cf. Bauman, *CM* 144 ff. discussing the *quod in Africa fuerit* alleged against Q. Ligarius. It follows that Dio's version of the charges against Cordus is mostly a recapitulation of evidence and argument.

[183] *Res Gestae* 2: ‚qui parentem meum interfecerunt, eos in exilium expuli, iudiciis legitimis ultus eorum facinus.'

[184] Cf. n. 167.

[185] Plin. *Ep.* 1.5.5 ff. and esp.: ‚quaero, quid de Modesto sentias', ‚non iam, quid de Modesto, sed quid de pietate Modesti sentias'. Sherwin-White, 97 proposes a ‚*pietas* of Modestus as judge' to account for Regulus' question, but Plin. *Ep.* 1.5.13 refutes this.

[186] Modestus' opinion was crucial to Pliny's case. Ib. 1.5.5.

[187] On which see Bauman, *CM* 47 f.

provoked the extreme hostility of Tiberius at the trial[188] and proved too strong for Caligula – in its unexpurgated form – even at the height of his reaction against Tiberian censorship. The most obvious explanation is, of course, that the *de famosis libellis* category of *maiestas* was not yet in existence when Augustus saw the work, but that does not explain his apparent approval of it. Another possibility – it derives some support from Tacitus' omission of the Augustan perusal from Cordus' speech – is that the work indicted in A. D. 25 was not the one seen by Augustus, being a second edition produced at some time between A. D. 22 and the date of the trial[189] and mounting a much stronger attack on the Principate: this might help to explain Tiberius' hostile reaction. Yet another possibility is that times had changed, that what had been acceptable to Augustus for special reasons of policy was not acceptable to his successors to whom imperial solidarity was of paramount importance.

The doctrine of the unnamed but identifiable victim, the most important and also the most ductile of the categories enunciated by the *senatus consultum* of A. D. 6, was destined to continue promoting the concept of imperial solidarity. In A. D. 32 M. Cotta Messalinus was charged with describing a dinner with the priests on Livia's birthday as a *cena novendialis*,[190] by which he meant that as she had not been deified her birthday was no more significant than the feast for the dead on the ninth day after a funeral.[191] He would have been condemned if Tiberius had not intervened with the important ruling *ne convivalium fabularum simplicitas in crimen duceretur*.[192] Livia, not having been deified, fell under the *lex maiestatis* even less than Divus Julius, but an alert accuser, remembering that Tiberius' prohibition of her consecration had not been well received,[193] thought that Tiberius could be identified as the target of the criticism implicit in Cotta's remark. If the charge had succeeded the non-entity through whom Tiberius had been defamed would have been brought within the ambit of the *lex maiestatis*, thus securing its quasi-recognition.

The *lex Pedia*, which had as part of Augustus' *acta* been in issue at the trial

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[188] Tac. *Ann.* 4.34.2.

[189] Sejanus was the instigator of the case against Cordus. Tac. loc. cit. The enmity between them went back to a remark passed by Cordus in 22. Sen. *Ad Marc.* 22.4; Tac. *Ann.* 3.72.5. Sejanus presumably seized upon the first opportunity to take his revenge, so that publication will in fact have taken place very shortly before the case.

[190] Tac. *Ann.* 6.5.1.

[191] Cf. Furneaux, 1.601; Koestermann, *TA* 2.248 f.

[192] Tac. *Ann.* 6.5.2. This dictum was the forerunner of a rule known to the classical jurists. *Dig.* 48.4.7.3.

[193] Vell. 2.130.5. Cf. Cerfaux & Tondriau, 340.

of Cremutius Cordus, was responsible for a most persistent manifestation of imperial solidarity under Tiberius' successors. For example, Claudius treated the murder of Caligula as an attack on himself; Otho was aghast at the recollection of his treason against Galba; Vitellius punished those who had had a hand in Galba's murder, not because he wished to honour Galba but because the traditional practice of the emperors required it; Domitian put Epaphroditus to death for having assisted in Nero's suicide; and Severus executed the murderer of Commodus.[194] All these cases went back ultimately to the *maiestas* category ‚cuius opera consilio malo consilium initum erit, quo quis magistratus populi Romani quive imperium potestatemve habet occidatur', but that category owed its existence to the *lex Pedia*,[195] so that in a very real sense the punishment of Caesar's murders became an institutional factor.

6. The Divi: Some post-Tiberian developments

The forensic performance of the Divi under Tiberius' successors is sparse and sporadic. So far as perjury by the *numen* of a Divus is concerned there is no reason to postulate any departure from the position established by Tiberius' ruling in Rubrius' case. Caligula made an oath *per numen Drusillae* his personal attestation after his deification of his sister Drusilla, and ordered all women to emply the same oath,[196] but there is no trace of a penal sanction. One might think that by excluding male deponents and the commercial complications involved in their oaths a sanction against women perjurers had become feasible, but the failure of the sources to mention any aberration of Caligula's is virtually decisive. Titus' statement that if past rulers were in fact demigods they would avenge themselves[197] may look something like a restatement of *deorum iniuriae dis curae*, but in fact there could not have been any need for a restatement after the dormancy of the *lex maiestatis* during Vespasian's reign and it should rather be seen as a general statement explaining why Vespasian's abolition of charges was being maintained.[198] The only known restatement is that of Severus Alexander in A. D. 223, when Tiberius' ruling was reaffirmed without comment as

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[194] Dio 60.3.4. Tac. *Hist.* 1.44. Ib.; cf. Suet. *Vit.* 10.1. Suet. *Dom.* 14.4; Dio 67.14.4. Dio 74.16.5; *SHA Vit. Sev.* 14.1.

[195] Cf. Bauman, *CM* 171 ff.

[196] Suet. *Cal.* 24.2; Dio 59.11.3.

[197] Dio 66.19.2. Cf. ch. I at n. 29.

[198] On the repercussions of this statement see at nn. 216–9 below.

far as oaths by the gods were concerned and a rider was added excluding liability for perjury *per principis venerationem* committed in the heat of the moment: ‚iurisiurandi contempta religio satis deum ultorem habet. periculum autem corporis vel maiestatis crimen secundum constituta divorum parentum meorum, etsi per principis venerationem quodam calore fuerit periuratum, inferri non placet.'[199] The *constituta divorum parentum meorum* to which Alexander refers is a rescript of Severus and Caracalla prescribing a sub-*maiestas* penalty for perjury *per genium principis*,[200] from which it can possibly be inferred that prior to that rescript this type of perjury had been *maiestas*,[201] although it could not have been so for very long in view of the continuous period of abeyance of the *crimen maiestatis* from Nerva to Marcus Aurelius.[202] In any event, so far as the Divi were concerned there was plainly no temporal penalty, and it would seem that at least in the matter of perjury a distinction between emperor and Divus was rigorously maintained.

The *iustitium* proclaimed by Caligula on Drusilla's death raises some difficult juridical problems. Suetonius says it was a capital offence to laugh, bathe or dine with parents, wife or children,[203] while according to Dio[204] people were accused not only of not mourning her as a mortal but also of lamenting her as a goddess (on which he is unexpectedly corroborated by Seneca[205]). The case selected by Dio to illustrate the position is that of the man who sold hot water and was executed ὡς ἀσεβήσαντα. The hot water was presumably sold for mixing with wine[206] and contravened the ban on festivities during the *iustitium*, but Dio places this case in the period following Drusilla's consecration,[207] which

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[199] *CJ* 4.1.2.

[200] Ulpian *Dig.* 12.2.13.6: ‚si quis iuraverit in re pecuniaria per genium principis dare se non oportere et peieraverit vel dari sibi oportere, vel intra certum tempus iuraverit se soluturum nec solvit: imperator noster cum patre rescripsit fustibus eum castigandum dimittere et ita ei superdici: προπετῶς μὴ ὄμνυε.' Cf. *PS Leid.* 5.20 f.: ‚hac lege damnari non potest, qui per salutem principis periuraverit.'

[201] Cf. Mommsen, *Strafr* 586; Serrao, *Il Frammento Leidense di Paolo* 130. On the possible connection beween *CJ* 4.1.2, *PS Leid.* 5.20 f and *Dig.* 48.4.7 see Archi, *Pauli Sententiarum Fragmentum Leidense*, Leiden, 1956, 87 ff.; Serrao, o. c. 131 f.

[202] On which see ch. VIII. Not every emperor in that period kept scrupulously to his undertaking, but there is no trace of charges based on perjury.

[203] Suet. *Cal.* 24.2.

[204] Dio 59.11.5 f.

[205] *Ad Polyb.* 17.5.

[206] Balsdon, 43.

[207] Dio 59.11.2–4: the consecration; 11.5: the ban on festivals and the hot water case.

means after the *iustitium*[208] and thus at a time when it was no longer unlawful to indulge in festivities. Suetonius, however, clearly allocates his capital offences to the period of the *iustitium*,[209] and it seems reasonable to transfer the hot water case to the same period. A most interesting position results, for Drusilla is now seen to have been susceptible to acts of impiety even before her consecration. Which is, of course, the position that Cotta Messalinus' accuser had hoped to establish – also through the doctrine of the unnamed victim – for Livia. It may also be the position that Caligula had in mind for his mother, in so far as any sense can be made of Dio's account of the *eques* who was forced to fight in the arena for insulting Agrippina, won his bout but was handed over to his accusers for execution, and had the further mortification of having his father put in a cage and killed.[210] This was five or six years after Agrippina's death,[211] and could thus have had two possible foundations. If the insult was recent, the basis of the charge was the attack on Caligula, the recognisable victim; but if it went back to Agrippina's lifetime – as, being a charge of *maiestas*, it could quite easily have done[212] –, the reputation of an *inlustris* was being vindicated posthumously. In either event the case is a striking example of imperial solidarity, of the enlargement of the imperial corpus.

Divus Augustus makes a brief forensic reappearance in Nero's reign. The charges against Thrasea Paetus included his rejection of the divinity of Poppaea, Nero's deified wife, and it was argued that such disbelief was tantamount to

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[208] The *iustitium* extended from Drusilla's death in June, 38 to August. Balsdon, 42 f., 133. It did not extend further. P. Memmius Regulus' reward for divorcing Lollia Paulina to enable Caligula to marry her was membership of the Arval Brethren, and he attended a meeting on 23 September. Smallwood, *Documents* p. 12. Cf. Balsdon, 47. This meeting, on Divus Augustus' birthday, was probably held to mark Drusilla's consecration. Cf. Balsdon, 44. A temporal gap between *iustitium* and consecration is also inferable from the tenses of Sen. *Ad Polyb.* 17.5: ‚numquam satis certus, utrum lugeri vellet an coli sororem, eodem omni tempore, quo templa illi *constituebat* ac pulvinaria, eos qui parum maesti *fuerant*, crudelissima *adficiebat* animadversione.' This implies that charges only began being brought in the consecration period, but the offences to which the charges related had been committed in the previous *(iustitium)* period.

[209] Suet. *Cal.* 24.2: ‚eadem defuncta iustitium indixit, in quo risisse ... capital fuit.'

[210] Dio 59.10.4. Cf. perhaps Suet. *Cal.* 27.3. On the face of it the case is nonsensical. The *eques* will not have been an early recipient of the later *maiestas* sentence of *bestiis obiciuntur* (*PS* 5.29.1), for that applied only to *humiliores*, and in any event if he survived *bestiis obiciuntur* it should have been the end of it.

[211] Dio notices the case under A. D. 38, but it should be dated to 39, for it was only then that Caligula revived the *lex maiestatis*. Cf. ch. VIII sec. 3. Dio is referring to the time when the offence was committed. Cf. n. 208 i. f.

[212] Since such a charge was not subject to extinctive prescription.

refusing to swear to the *acta* of Divus Augustus or Divus Julius: ‚eiusdem animi est Poppaeam divam non credere cuius in acta divi Augusti et divi Iuli non iurare. spernit religiones, abrogat leges.'[213] This is an important charge. It shows, perhaps more clearly than any other, the ultimate dependence of the Divi on *maiestas p. R.*, for whatever the ‚abrogated' *leges* may have been[214] they were instruments of the *populus Romanus*. Moreover, by being measured against the *acta* of the senior Divi,[215] Diva Poppaea was in a sense being emancipated from the *existimatio* of the emperor. The Divi were bidding fair to establish an institution of their own.

A Divus could not be assassinated, but that he could be subjected to something very close to *memoriae damnatio* seems to be a necessary inference from a puzzling passage in Dio in regard to Divus Titus. Dio says that those who wished to praise (ἐπήνουν) Titus were careful not to do so in Domitian's hearing, because that would have been tantamount to defaming the emperor openly and within his hearing.[216] Despite appearances, this is not one of Dio's less felicitous ventures, for if it is read with an assertion by Suetonius it begins to make sense. Suetonius says that after Titus' death Domitian bestowed no honour on him except deification, and often attacked him indirectly in his speeches and edicts: ‚defunctum nullo praeterquam consecrationis honore dignatus, saepe etiam carpsit obliquis orationibus et edictis.'[217] Domitian is known to have resisted the senate's attempts to force him to adopt certain of Titus' *acta*, especially the oath not to put senators to death,[218] and what the sources are telling us is that he was deliberately setting out to undermine Titus' standing, to devalue his *acta* so as to eliminate any possibility of *divus Titus responderat, neque fas Domitiano infringere dicta eius*[219] being used to exert pressure on him. To Domitian, the great centraliser, the policy of Titus appeared dispersive and disruptive, and

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[213] Tac. *Ann.* 16.22.5 f. On Claudius cf. Suet. *Claud.* 45 and n. 215 below.

[214] The only *lex* that comes to mind is the *lex Rufrena* (Rotondi, 436 f.) which seems to have dealt with Caesar's deification. But for Augustus and his successors the senate seems to have acted alone. Cf. Sen. *Apocol.* 1 (‚in senatu iuravit se Drusillam vidisse caelum ascendentem'); Tac. *Ann.* 12.69.4, 13.2.6, 16.21.2. See also Scott, *Flavians* 44, 61.

[215] This case (and that of Cremutius Cordus) may refute the assertion of Gagé, 23 that ‚il est remarquable que le *Divus Julius* n'est jamais compté parmi les *divi* impériaux'. As for Divus Claudius, his omission, even if merely done in order to avoid antagonising Nero (Furneaux, 2.456, Koestermann, *TA* 4.382), will have weakened his position. Subsumption under the *lex* was the surest proof of constitutional status.

[216] Dio 67.2.5.

[217] Suet. *Dom.* 2.3.

[218] Cf. ch. VIII sec. 5.

[219] Cf. at n. 65.

the *crimen maiestatis* was permitted to give further proof of its virtuosity by furnishing a weapon against that policy, by invalidating the acts of a Divus whom the current regime saw as inimical to imperial solidarity. But of course Divus Titus only had himself to blame, for it was he who had rashly observed that if the deified emperors were truly divine they would be able to look after themselves.

V. IMPIETAS IN PRINCIPEM: THE EMPEROR: A. D. 14–37

1. Renuntiatio amicitiae

In A. D. 20, at the trial of Cn. Calpurnius Piso arising out of the death of Germanicus, Tiberius charged the senate to maintain a strict line of demarcation between injuries to the emperor, for which the appropriate penalty was *renuntiatio amicitiae*,[1] and wrongs falling under the *leges iudiciorum publicorum*. The salient points of the speech[2] in which Tiberius thus rather unexpectedly propounded the distinction between ‚fictitious' and ‚actual' charges are as follows:

> If Piso forgot his duty to his commander and gloated over his death and my sorrow, I will renounce his friendship and expel him from my house, but I will not use my power as emperor to avenge private wrongs (‚odero seponamque a domo mea et privatas inimicitias non vi principis ulciscar'). If, however, there is proof of murder it will be your duty to exact just retribution. You are to consider whether Piso incited his troops to sedition, won their support by corruption and regained his province by force, or whether these are lies elaborated by the accusers, at whose excesses I am understandably incensed. I weep for my son, and always will, but I do not prevent the accused putting forward anything which may establish his innocence or convict Germanicus of injustice, if such was the case. I beg you not to regard charges as proved merely because my personal grief is involved. I urge those who owe Piso a service to defend him with all their strength in his hour of need, and I urge the accusers to use their best endeavours on behalf of their case. In one respect only will we place Germanicus above the *leges* (sc. *iudiciorum publicorum*), and that is that the trial will be conducted in the senate instead of in the appropriate *quaestio perpetua*.

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[1] On this remedy in general see L. Friedlaender, *Roman Life and Manners under the Early Empire*, tr. L. A. Magnus, London, no date, 1.79 ff. What is known of *amicitia populi Romani* – see A. J. Marshall, ‚Friends of the Roman People', *AJP* 89 (1968), 39 ff. – does not bear significantly on our theme.

[2] Tac. *Ann.* 3.12.4–10. Cf. Suet. *Tib.* 28 i. f. The speech is generally accepted as authentic. See e. g. Syme, *Tacitus* 1.283.

Tiberius, then, saw two possible heads of wrongdoing in the case: *privatae inimicitiae* on the one hand, and a breach of either the *lex Cornelia de sicariis et veneficis* or the Republican categories of the *lex maiestatis* on the other. This doctrine was not, of course, a denial of the defamation category introduced by the legislation of A. D. 6 and 8, for Tiberius in no way suggested that an act should be divorced from the public criminal law if it was ultimately of a seditious character. What he had in mind was essentially the non-seditious injury, the sort that the legislation of A. D. 6 and 8 had had no thought of elevating to a public crime – the sort that the Severans were to allocate to ‚other charges of that sort'. But by what criteria were the Romans able to judge the point at which private injury ended and public crime began? Was there any stage at which what should have been disposed of by *renuntiatio amicitiae* began attracting the penalties of the public criminal law?

Until Sejanus' ministry Tiberius gave a consistent answer to these questions. His rulings in 15 (including the absolution of Granius Marcellus on the charge of *sinistros de Tiberio sermones habuisse*[3]) anticipated the pronouncement of A. D. 20, and so did the rejection of the charges of verbal treason against Appuleia Varilla so far as Tiberius and Livia were concerned. Nor was the position any different with the first ruling after 20, when Ateius Capito reaffirmed the need to separate private injuries from those affecting the *res publica* and Tiberius agreed with him.[4]

Tiberius well knew that the private character of *renuntiatio amicitiae* needed constant reiteration, for that concept had previously given convincing proof of its ambivalence, of its ability to alternate in most confusing fashion with remedies under the public criminal law. Renunciation of friendship had no doubt fulfilled its proper function in the case of the Rufus who had insulted Augustus in the middle years of his reign, but earlier, in 26 B. C., the arrogant conduct of Cornelius Gallus in Egypt had earned him both a *renuntiatio amicitiae* by the

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[3] Tac. *Ann.* 1.74.3, 7.

[4] A full exposition of Tiberius' attitude is in Suet. *Tib.* 28: ‚adversus convicia malosque rumores et famosa de se ac suis carmina firmus ac patiens, subinde iactabat in civitate libera linguam mentemque liberas esse debere; et quondam senatu cognitionem de eius modi criminibus ac reis flagitante: „non tantum", inquit, „otii habemus, ut implicare nos pluribus negotiis debeamus; si hanc fenestram aperueritis, nihil aliud agi sinetis; omnium inimicitiae hoc praetexto ad vos deferentur."' This undoubtedly goes back to the first period of the reign, and may possibly reflect sentiments expressed by Tiberius on the occasion of his rejection of the charges in respect of Appuleia Varilla's defamation of Livia and himself. Cf. ch. IV at nn. 51–7, and esp. n. 52; ‚ne *cui* verba in eam quoquo modo habita crimini forent.' See also ch. VIII sec. 7.

emperor and a decree of the senate subsuming his offence under the public criminal law.[5] In such a case the renunciation issuing from the emperor's domestic court did not authorise a plea of *res iudicata* in the public prosecution,[6] the reason being that the facts were being looked at in two different ways – as *privata iniuria* and as *maiestas p. R. minuta*. There was, however, one aspect of Gallus' case that tended to obscure the distinction between the public and private remedies, and that was the fact that the renunciation decree included Gallus' exclusion from the imperial provinces[7] – the analogue of exile under the public criminal law rather than the narrow (even if politically deadly) expulsion envisaged by *seponam a domo mea*, and clearly moving rapidly towards the area of *iussum principis* under the provincial sections of the *lex Julia maiestatis*.[8]

The true origins of the capacity for ambivalence exhibited by *renuntiatio amicitiae* go even further back, to Octavian's renunciation of Antony's friendship and the *coniuratio* of 32 B. C.[9] Octavian did not have Antony declared a *hostis* as he did Cleopatra,[10] but the distinction may have escaped those whom the *coniuratio* obliged to consider Antony an *inimicus*.[11] This obligation on all oath-takers to subscribe to their leader's private *hostis* declarations was perpetuated in subsequent oaths,[12] and once the oath achieved empire-wide currency the totality of its deponents corresponded exactly – in the arithmetical sense, at any rate – with the *populus Romanus*, so that the *inimici* of the emperor became the *inimici* of all and it became increasingly difficult to maintain a distinction between *iniuria principis* and *maiestas p. R. minuta*. In theory there was a distinction, as Tiberius well knew, and it might be more hopefully maintained

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[5] Rufus' case is cited by Sen. *Ben.* 3.27.1 f. in support of the assertion that ‚sub divo Augusto nondum hominibus verba sua periculosa erant, iam molesta'. Rufus, a senator, had expressed the hope that Augustus would not return from a journey. He subsequently apologised, asking ‚ut ignosceret sibi rediretque in gratiam secum'. The incident took place well before A. D. 8, for Augustus was not doing much travelling at that time. Rufus may, however, be the man whose name was being used by pseudonymous pamphleteers in A. D. 6. Perhaps he was as incorrigible as Cassius Severus. – On Cornelius Gallus see Bauman, *CM* 180 ff.

[6] Ib., with lit.

[7] Suet. *Aug.* 66.1: ‚(Cornelio Gallo) ob ingratum et malivolum animum domo et provinciis suis interdixit.'

[8] Cf. ch. IV at n. 150.

[9] On the renunciation see Syme, *RR* 288, 291 f. Cf. Bauman, *CM* 224 n. 82 with lit. On the *coniuratio* see Bauman, *CM* 222 ff. with lit.

[10] Syme, loc. cit.

[11] Bauman, *CM* 224 f., summarising Premerstein. The obligation was sanctioned by the oath-analogue of the *maiestas* penalty. Bauman, *CM* 230.

[12] Bauman, *CM* 223 ff.

if the emperor refrained from becoming *pater patriae*, as Tiberius so resolutely did,[13] but in the end the sheer illogic of events was bound to lead to coalescence, or at any rate to a very close parallelism.[14] What would have been the effect of the senate acquitting someone whose friendship the emperor had renounced?

Tiberius' rulings on *maiestas* seem to have been fated to require immediate clarification, for the ambiguities of A. D. 15 were repeated in 20 when it became necessary for him to add a rider to his dictum in Piso's case. The occasion was the return to Rome of D. Silanus. He had been excluded from Augustus' friendship for adultery with the younger Julia in c. A. D. 8 and had interpreted this as virtually a sentence of exile despite the fact that no public criminal proceedings had been instituted; he now returned to Rome, after obtaining the permission of the senate.[15] Tiberius, however, declared that the permission to return granted by the senate was redundant, for Silanus had not been exiled by either *senatus consultum* or *lex*[16] and was entitled to return as of right; but as far as the *renuntiatio* was concerned he would maintain it, since nothing had happened to warrant a reversal of Augustus' decision in that regard.[17] Thereafter, adds Tacitus, Silanus lived in Rome but held no office. Tiberius intended his observations about Silanus to clear up a point not covered by his charge to the senate in Piso's case. That charge had deliberately rejected the doctrine of a double remedy as it had been applied against Cornelius Gallus (this abandonment of an Augustan precedent is partly explained by the extreme reluctance with which Augustus had acquiesced in the precedent in the first place[18]), but it had not been necessary for the purposes of Piso's case to deal with the implications of the fact that renunciation could include interdiction from the imperial provinces. The interdiction in Gallus' case, coupled with the fact that there had been a *senatus consultum* against Gallus,[19] had led Silanus to believe that it was incumbent on him to leave Rome and, later on, to address himself to the senate

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[13] Tac. *Ann.* 1.72.2, 2.87.2; Suet. *Tib.* 26.2, 67.2; Dio 58.12.8. On the implications of this status see Bauman, *CM* 235 ff.

[14] Cf. Bauman, *CM* 211 f., 226 ff., 229, 232 f., 240 f.

[15] Tac. *Ann.* 3.24.1, 5 ff.

[16] Tac. *Ann.* 3.24.6: ‚id (*sc.* quod revertisset) iure licitum, quia non senatus consulto, non lege pulsus foret.'

[17] Ib. 3.24.7.

[18] A crisis of delimitation of the respective areas of the *domus* and the *res publica* lies behind Suet. Aug. 66.1 f.: ‚(Cornelio Gallo) ... interdixit. sed Gallo quoque et accusatorum denuntiationibus et senatus consultis ad necem conpulso laudavit quidem pietatem tanto opere pro se indignantium, ceterum et inlacrimavit et vicem suam *conquestus est, quod sibi soli non liceret amicis, quatenus vellet, irasci.*'

[19] Suet. loc. cit.

before going back, and this misconception was what Tiberius wanted to clear up. The segregation of *privatae iniuriae* from *rei publicae iniuriae* worked both ways: it spared the accused the full rigours of the public criminal law, but it also circumscribed the criminal jurisdiction of the senate, in as much as those who had not inflicted a penalty were not competent to rescind it.

Despite Tiberius' firm stand in 20, *renuntiatio amicitiae* was destined to continue moving steadily closer to the *crimen maiestatis p. R. minutae* throughout the reign, and we have in this phenomenon one of the most important clues to the gradual emergence of a fusion between ‚other charges of that sort' and what the jurists and historians believed could properly be subsumed under the *crimen maiestatis*. In our discussion of cases of *iniuriae* to the emperor under Tiberius we will therefore be always on the alert for two types of case – those with clear connotations of sedition and those in which there were no such connotations, in which what should have been disposed of by *renuntiatio amicitiae* was submitted to the arbitrament of the public criminal law.

2. Sejanus and the lex maiestatis

One of the most striking features of Sejanus' ministry is its sophisticated employment of the defamation category of *maiestas* as an instrument of government. Prior to Sejanus there is no recorded instance of a conviction under this category, and even a *receptio inter reos* is attested only in respect of Appuleia Varilla's remarks about Divus Augustus. As far as the emperor is concerned, therefore, the history of verbal injury in Tiberius' reign begins with Sejanus' rise to power in A. D. 23, and it is over the ensuing eight years that all the essential steps in forging the remarkable instrument of repression represented by the defamation category will be seen to have been taken.

When was the first successful prosecution for verbal treason in Tiberius' reign? Some would have it that there is no proof of such an occurrence until A. D. 25,[20] and it must be admitted that the evidence for an earlier date is in a state of some disarray. On a full analysis, however, it is possible to date the first case to A. D. 24 with reasonable certainty, and it happens to be a case in which *renuntiatio amicitiae* began its progression towards assimilation with the *crimen maiestatis p. R. minutae*.

Dio rather obligingly makes 23, the year that witnessed the beginning of

[20] E. g. Marsh, 61 n. 1, 115 n. 1, 173.

Sejanus' ascendancy,[21] a vintage year in the history of verbal treason, but it is unfortunately not possible to accept the gift. Dio's impression is that one Aelius Saturninus was condemned by the senate for reciting insulting verses about Tiberius and was hurled from the Tarpeian Rock; that many others were executed for similar crimes; that Tiberius investigated all charges with great care, even causing a remark made secretly to a single interlocutor to be entered in the public records; and that he would not accept denials, going so far as to insist on oath that the words had been uttered and so doing himself the very mischief for which he punished others.[22]

Dio's account of the trials of 23 is specious enough, and his attribution of Aelius Saturninus' trial to the senate is more encouraging than his frequent and vague ἐθανάτωσε,[23] but Tacitus does not share Dio's view of this year. He does condemn the *maiestatis quaestio* as the one blot on the landscape,[24] but he does not know of any cases of verbal treason. A point in Dio's favour is his allocation of the trial of L. Capito, procurator of Asia, to the end of his account of the events of 23, thus agreeing well with Tacitus' allocation of the case,[25] but for the most part Dio's chronology for 23–25 is singularly inept. His allusion to the man who made a secret remark to a single interlocutor contains a trace of an authentic case, but not one which occurred in 23. Dio has in fact preserved an incident from the two trials of Vibius Serenus attested by Tacitus. In 23 Serenus was deported to Amorgus for *vis publica* arising out of his proconsulship of Baetica, and in 24 he was accused by his son of having, while governing Baetica, plotted against Tiberius and collaborated with C. Caecilius Cornutus in supporting Sacrovir's rebellion in Gaul. Cornutus committed suicide, but Serenus argued that he would not have plotted assassination and revolution with only one accomplice (‚non enim se caedem principis et res novas uno socio cogitasse') and demanded that others be produced. The accuser nominated Cn. Lentulus and Seius Tubero, but both were plainly innocent and were absolved. Serenus' slaves were examined (there was no sale to the *actor publicus* – it was *maiestas*, under a Republican category, from the start), but their evidence favoured the accused. Tiberius, who had an old grudge against Serenus going back to the

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[21] Cf. Tac. *Ann.* 4.1–16, esp. 4.1.2, 4.2.4.

[22] Dio 57.22.5–23.3.

[23] In fairness to Dio it should be said, however, that the *s. c.* laying down a ten days' delay before a judgment of the senate could be carried out meant that unless the emperor decided to set the judgment aside, he in effect made it his own.

[24] Tac. *Ann.* 4.6.3.

[25] Dio 57.23.4; Tac. *Ann.* 4.15.3.

latter's ill-advised remarks at the time of his exclusion from the rewards paid to the accusers in Libo Drusus' case, now revived that issue and added charges from subsequent years (presumably also concerned with verbal injury);[26] but he vetoed both the death penalty and the more rigorous internment proposed against Serenus, and the latter was returned to Amorgus.[27] It would seem that the accuser, the younger Serenus, had evidence (from his father's slaves who subsequently changed their ground) of private discussions between Serenus and Cornutus (‚uno socio cogitasse'), and abuse of Tiberius no doubt figured prominently in the discussions. It was thus a case of ‚remarks made secretly to a single interlocutor' and those remarks were ‚entered in the public records' by way of registration of the *postulatio* in the *acta senatus*, and if the *postulatio* was already in existence in 23 (support for Sacrovir went back to the time in Baetica no less than the *vis publica* did) it becomes clear how Dio came to conflate the two halves of the proceedings against Vibius Serenus.

Other aberrations of Dio at this time are less easy to explain. His assertion that Tiberius swore that certain defamatory words had been uttered does not seem able to be connected with any known case,[28] and his allocation to A. D. 25 of a charge of plotting which is unmistakably the charge of complicity in Serenus' treason brought, in 24, against Cn. Lentulus and Seius Tubero[29] further undermines his credibility. We cannot therefore have much confidence in Aelius Saturninus as the first *damnatus* for verbal treason in Tiberius' reign. Everyone wanted to make the first condemnations coincide with Sejanus' arrival on the scene – witness Tacitus' strictures on the *maiestatis quaestio* –, but only Dio took cases out of context in order to establish such a coincidence.

The second trial of Vibius Serenus is certainly a case in which the defamation category played an important part, in as much as the old insults of Serenus, of which ready proof was available, were used to get a charge of *maiestas* accepted and so to (hopefully) make it possible to secure proof of conspiracy through the slaves, but this was not the first case of verbal treason in 24. That position, in

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[26] Ib. 4.29.3 ff.: ‚non occultante Tiberio vetus odium adversum exulem Serenum. nam post damnatum Libonem missis ad Caesarem litteris exprobaverat suum tantum studium sine fructu fuisse, addideratque quaedam contumacius quam tutum apud aures superbas et offensioni proniores. ea Caesar octo post annos rettulit, medium tempus varie arguens.' Cf. ch. III at n. 46.

[27] Ib 4.13.2; 4.28.1–30.2.

[28] The only possibility is the case of Votienus Montanus. Cf. at nn. 55–9.

[29] Dio 57.24.8. Cf. Tac. *Ann.* 4.29.1. In both passages Lentulus is an *amicus* of Tiberius and a very old man. In Tacitus he is absolved expressly, and in Dio by clear implication.

Tacitus, is occupied by the trial of C. Silius, legate of Upper Germany from 14 to 21 and a recipient of the *ornamenta triumphalia* for his part in the suppression of Sacrovir.[30] His trial is signalled by a reference to Sejanus' newly-enunciated policy of meeting the threat of civil war by destroying the leaders of Agrippina's party,[31] and the general cause of his ruin is said by Tacitus to have been his friendship with Germanicus; a more specific reason is his successes in Germany; a still more specific reason is his boast that only his army's loyalty during the Rhine mutiny had kept Tiberius on the throne;[32] and the charges brought up in the indictment are also said to have included complicity with Sacrovir and extortion.[33] His wife, Sosia, was charged as an accomplice.[34] Tacitus, following substantially the same line as at the trial of C. Silanus, says that the accused were clearly guilty of extortion but that the whole trial was conducted on the basis of *maiestas:* ‚nec dubie repetundarum criminibus haerebant, sed cuncta quaestione maiestatis exercita.'[35] Tiberius allowed the consul Visellius Varro to be the accuser despite an objection by the defendant, on the grounds that a consul was the proper person to see to it that the state came to no harm.[36] When Silius saw that condemnation was inevitable he committed suicide. His property was sequestrated, but not, oddly enough, for the purpose of making restitution to the provincials, since apparently none of them had lodged claims: the purpose was to pay over to the *fiscus* all gifts given to Silius by Augustus.[37] This, adds Tacitus, was the first time that Tiberius showed interest in other people's property.[38] The sentence on Sosia was exile, after a debate on how much of her property should be confiscated: Asinius Gallus proposed confiscation of half and the division of the rest among the children, but Marcus Lepidus moved that a quarter be paid to the accusers *secundum necessitudinem legis* and that

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[30] On his career see Koestermann, *TA* 2.85.

[31] Tac. *Ann.* 4.17.4: ‚instabat quippe Seianus incusabatque diductam civitatem ut civili bello; esse qui se partium Agrippinae vocent, ac ni resistatur, fore pluris; neque aliud gliscentis discordiae remedium quam si unus alterve maxime prompti subverterentur.'

[32] Ib. 4.18.1 f.

[33] Ib. 4.19.4: ‚conscientia belli Sacrovir diu dissimulatus, victoria per avaritiam foedata.'

[34] Ib.

[35] Ib. 4.19.5.

[36] Ib. 4.19.1 f. Cf. Bauman, *Tiberius* 423 f.

[37] Tac. *Ann.* 4.20.1: ‚saevitum tamen in bona, non ut stipendiariis pecuniae redderentur, quorum nemo repetebat, sed liberalitas Augusti avulsa, computatis singillatim quae fisco petebantur.'

[38] Ib. 4.20.2.

the rest be released to the children.[39] A *damnatio imaginum* was decreed against Silius.[40]

The most puzzling features of this case are, first, the fact that Silius' property was laid under distress despite his pre-judgment suicide and the rule protecting the accused's property in such a case;[41] and second, the fact that the sequestration was a selective one confined to *liberalitas Augusti avulsa*. Can this be described as confiscation under the *lex maiestatis*? Three questions arise. If the senate had decided to depart from the rule exempting the property of suicides, why did it do so in such a peculiar way: why, in other words, did the arithmetic in the case of Silius himself differ so fundamentally from the normal forfeiture of a defined proportion of assets imposed on Sosia? Moreover, why did the senate presume to make an order in favour of the *fiscus*,[42] and why did it not make an order securing the remnant[43] for the *aerarium*? Finally, why does Tacitus say that this was the first time that Tiberius showed interest in other people's property, seeing that it is also Tacitus who provides evidence of earlier confiscations[44]?

The answer to these questions can only be that Tiberius had renounced Silius' friendship and had coupled it with revocation, on the grounds of gross ingratitude, of gifts given by Augustus. It was not, strictly speaking, *publicatio bonorum* under the public criminal law at all: it was an analogous remedy to the

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[39] Ib. 4.20.2 f.

[40] Vittinghoff, 16 n. 43, 54 ff.

[41] On this rule see Brunt, 203 n. 40; Koestermann, *TA* 2.309; D. C. A. Shotter, ‚The Case of Pomponius Labeo', *Latomus* 28 (1969), 654 ff. The belief of Rogers, *JRS* 49 (1959), 90 ff. that in attesting such a rule Tacitus betrays ignorance of the law has not attracted support. F. de Visscher, *Bull. Acad. Roy. de Belgique*, 1957, 176 ff. holds that the rule was changed in Tiberius' reign, but see J. Crook, *Law and Life of Rome*, London, 1967, 276. In any event, the solution offered in the text is that there was certainly a circumvention of the rule in Silius' case.

[42] On the *aerarium* vs. *fiscus* question see A. H. M. Jones, *Studies in Roman Government and Law*, Oxford, 1960, 106 ff., 192 ff. A related question, the status of imperial procurators, had been the subject of litigation the year before Silius' case, when Tiberius had authorised the senate to try L. Capito, procurator of Asia, on charges of exceeding the authority given to him by the emperor: ‚Lucilius Capito accusante provincia causam dixerit, magna cum adseveratione principis, non se ius nisi in servitia et pecunias familiares dedisse: quod si vim praetoris usurpasset manibusque militum usus foret, spreta in eo mandata sua (cf. ‚spretam Tiberii maiestatem' in C. Silanus' case): audirent socios.'

[43] It is clear from Tacitus that only amounts due to the *fiscus* were taken into account, although, as Koestermann, *TA* 2.89 observes, Silius must have possessed some assets besides gifts from Augustus.

[44] E. g. 3.23.4 (confiscation waived as a concession to Mam. Scaurus); 3.68.3 (partial confiscation decreed).

right of revocation recognised by the private law,[45] except that it was being submitted to the cognisance of the senate in company with the *iniuria* that had precipitated it. Tiberius renounced Silius' friendship prior to the criminal proceedings, but did not at that stage have regard to the Augustan gifts, for the possibility of Silius' property escaping retribution had not yet arisen; but after his suicide it was decided to seize the senate of the financial aspects of the renunciation, and so partially to resolve the problem of the property of pre-judgment suicides. *Renuntiatio amicitiae* had made a considerable advance since A. D. 20: the precise demarcation-line of that year had begun to suffer erosion, and it was only a question of time before acts inconsistent with the emperor's friendship were fully subsumed under the *lex maiestatis*.

What was the wrongful act of Silius on which Tiberius based his renunciation? It will clearly have to be something that was brought up in the subsequent criminal charges, in order to give the senate a basis on which to decree quasi-confiscation. What is needed is an insult to the emperor, and here Tacitus obliges with his assertion that Silius' boast about his army's loyalty had aggravated his offence:

> Credebant plerique auctam offensionem ipsius intemperantia, immodice iactantis suum militem in obsequio duravisse, cum alii ad seditiones prolaberentur; neque mansurum Tiberio imperium, si iis quoque legionibus cupido novandi fuisset. destrui per haec fortunam suam Caesar imparemque tanto merito rebatur.[46]

Silius' claim to have held the *imperium* within his gift was an aspersion on Tiberius, a diminution of his personal majesty – and it was also a diminution of the *maiestas* of the Roman people who had conferred that *imperium*. This injury was now resuscitated in order to gain access to Silius' slaves in connection with the Sacrovir affair. The injury also provided the justification for the revocation of the gifts of Augustus, and it is precisely here that the complexities of the position are most clearly apparent. The grounds of revocation were the injury to Tiberius as a member of Augustus' *domus*, not as emperor, but *maiestas p. R. minuta* came into it because of the allusion to *imperium*, and thus the pri-

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[45] Although as a rule only in the case of gifts to children, grandchildren and *liberti* (all of whom owed a duty of *pietas* to the donor – cf. the duty owing by C. Silius to Augustus, the *pater patriae*). An excellent parallel to the text is *CJ* 8.55.7.1 (= *CTh* 8.13.1): ‚quidquid igitur is qui a matre impietatis arguitur ex titulo donationis tenet ... matri cogatur reddere.'

[46] Tac. *Ann.* 4.18.2.

vate cancellation of gifts was incorporated in a public act, in a decree of the senate.

Silius' case was immediately succeeded by two others. A *receptio inter reos* was authorised against L. Calpurnius Piso on a charge of *secreti sermonis adversus maiestatem habiti,* to which was added an allegation that he had kept poison at his house and had entered the senate wearing a sword. He anticipated condemnation by suicide.[47] Tacitus gives no particulars of the *secretus sermo adversus maiestatem,*[48] but it is to be presumed that some verbal injury by Piso was used to initiate the case and that the evidence thus uncovered led to the joinder (‚*adiecit* in domo eius venenum esse') of charges under the *lex Cornelia de sicariis et veneficis.* The other case is the second trial of Cassius Severus, at which the senate imposed an intensified penalty of confiscation, interdiction and internment on Seriphus. The reason for this was that after being relegated to Crete by Augustus, Cassius had persevered in his old activity and had added new enemies to old: ‚illic eadem actitando recentia veteraque odia advertit.'[49] Cassius had thus continued his policy of defaming *inlustres* in general rather than the emperor in particular. It is quite certain that Tiberius was not even among the victims of the latest attacks, for if he had been Tacitus would not have failed to mention it.

The first actual conviction for defaming Tiberius was that registered against Silius' wife, Sosia (Silius himself anticipated condemnation by suicide), and the first of Tiberius' reign for defaming other *inlustres* was that of Cassius Severus, but the point is that in so far as such charges are seen as a mechanism for uncovering evidence of something else the date of the first recorded conviction is largely irrelevant: a criminal investigation bureau does much of its work behind the scenes, and its part in securing a conviction does not always appear. Sejanus was the first to detect the full potential of the remarkable instrument created by the legislation of A. D. 6 and 8, and he exploited it systematically and logically. For example, when his *acerrimi canes* were in full cry after Cremutius Cordus, he himself appeared as a subscriber to the indictment[50] – not for profit, but in

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[47] Ib. 4.21.3 f.

[48] In the same context Tacitus attests Piso's persistent attacks on judicial corruption and his violation and diminution of the dignity of Livia (‚se violari et imminui quereretur') by summarily enforcing a civil claim against her friend Urgulania. Tac. *Ann.* 4.21.1; cf. 2.34.1, 4. But no secret conversations were involved in these matters.

[49] Ib. 4.21.5.

[50] See Sen. *Ad Marc.* 22.5, where ‚consecratur subscriptio' clearly refers to an act of Sejanus. Cf. ‚in monimentis maximi imperatoris consecrari perfidum militem' immediately before.

furtherance of a policy. Visellius Varro assumed the role of accuser in Silius' case for a similar purpose. He was probably only a subscriber,[51] but there ought to be a better reason than his desire to avenge his father,[52] or than the grounds stated by Tiberius,[53] for the regime's readiness to face the criticism certain to be provoked by allowing a consul to be an accuser. (He could have given his *sententia* in the senate without taking any active part in the case.) It was a question of high imperial policy, of being seen to give official backing to the accusers in so widespread a scandal as the Sacrovir affair. Only through the *crimen maiestatis* could this official note be struck, and only through the defamation category of that *crimen* could it be struck regularly and effectively.

Towards the end of 24 the second trial of Vibius Serenus was held, and this was followed by the conviction of C. Cominius, an *eques Romanus*, on a charge of writing a *probrosum carmen* against Tiberius. His conviction was, however, set aside by Tiberius at the request of his brother.[54] The new year opened with the trial of Cremutius Cordus, and shortly afterwards Votienus Montanus was charged with making insulting remarks about the emperor (‚ob contumelias in Caesarem dictas'). At the preliminary hearing on *receptio* a military witness by the name of Aemilius showed his zeal for the truth by sparing no detail, thus obliging Tiberius to hear what was being said about him in private (‚probra quis per occultum lacerabatur'). Stung by this, the emperor cried that he would clear himself either immediately or at the trial,[55] and was with difficulty persuaded to calm down. Votienus was sentenced to the penalties for *maiestas* (‚maiestatis poenis adfectus est').[56] The presence of the military witness suggests that Montanus may have been guilty of inciting soldiers to sedition,[57] but the more interesting aspect of the case is that if the witness was the Aemilius who had been a trusted *primipilaris* of Germanicus,[58] he may have been promoting the interests of the Julian faction by exposing Tiberius to the acute embarrassment which the sources stress as a noteworthy feature of the defamation trials.[59] Scientific use of

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[51] There were other accusers. Tac. *Ann.* 4.20.3.

[52] Ib. 4.19.1: ‚paternas inimicitias obtendens.' The reason for the *inimicitia* is in 3.43.4.

[53] On which see Bauman, *Tiberius* 423 f.

[54] Tac. *Ann.* 4.31.2.

[55] ‚Ut se vel statim vel in cognitione purgaturum clamitaret', which clearly makes it a preliminary hearing. Cf. Koestermann, *TA* 2.144.

[56] Tac. *Ann.* 4.42.1 ff.

[57] So Marsh, 173; cf. 61 n. 1, 115 n. 1. Bleicken, 52 believes that Tacitus has suppressed the full gravity of Montanus' offence.

[58] So Furneaux, 1.301; Koestermann, *TA* 1.274.

[59] Tac. Ann. 4.42.2. Dio 57.23.1–3 generalises the Montanus incident into regular self-exposure to ridicule by Tiberius. Cf. Suet. *Tib.* 66.

the defamation category was not a monopoly of the regime: there was no safer way of expressing defamatory sentiments than while testifying in court.

With the trial of Titius Sabinus, Sejanianism came of age. Sabinus, an *inlustris eques Romanus*, had been marked down for destruction by Sejanus in 24, but Silius, the other leader of the Julian faction according to Tacitus, had been dealt with first,[60] and Sabinus' case was taken up at some time between 24 and 27.[61] Sejanus entrusted the case to L. Latiaris and three other *praetorii*, with instructions to conduct what gives every indication of having been the ancient precursor of the police trap.[62] Latiaris won Sabinus' confidence and persuaded him to follow his example in making derogatory remarks about Sejanus and Tiberius. The next step was to get Sabinus to repeat his remarks before a larger audience. This was done by concealing the other three *praetorii* in the roof of Sabinus' house while Latiaris engaged him in treasonable conversation. The record of these conversations was handed over to Tiberius, and the result was a letter from the emperor to the senate accusing Sabinus of tampering with his freedmen and plotting against him. On 1 January 28 Sabinus was condemned by the senate and led away to summary execution. Tiberius thanked the senate for disposing of an enemy of the state (‚hominem infensum rei publicae') and hinted at other conspirators, by which Tacitus understood him to mean Nero and Agrippina.[63]

There is no need to look for esoteric explanations for this case.[64] Sabinus was suspected of being a ringleader in whatever tortuous operations the party of Agrippina and Nero was planning,[65] but there was not enough evidence for a *receptio inter reos*, nor was there even proof of casual insults to Tiberius or Sejanus by which the fact-finding machinery could be set in motion. Therefore a refinement of previous techniques was devised: if no defamatory situation existed, let one be created. Tacitus has, however, left something out. He does not attest a stage at which the contrived defamation was used to initiate criminal proceedings and to gain access to the slaves, but that there was such a stage is

[60] Tac. *Ann.* 4.18.1.

[61] Cf. Furneaux, 1.569; Koestermann, *TA* 2.201.

[62] The same technique had been used against Libo Drusus, although not in connection with verbal injury. Cf. Tac. *Ann.* 2.27.2 on Firmius Catus' incitement of Libo. A similar technique, in connection with verbal injury, was used against Apollonius of Tyana by Domitian. Philostr. *Vit. Apol.* 7.36.

[63] Tac. *Ann.* 4.68.1–70.7. Cf. Dio 58.1.1b–3, except that he makes words Sabinus' only crime and has him executed without trial.

[64] *Pace* Koestermann, *TA* 2.205 f.

[65] On which see W. Allen, ‚The Political Atmosphere of the Reign of Tiberius', *TAPA* 72 (1941), 1 ff.

almost certain. The topics discussed by Sabinus and Latiaris did not include the tampering with freedmen or plotting against Tiberius about which the emperor was subsequently to write to the senate,[66] and those matters must have come to light later. Moreover, the elder Pliny makes it quite certain that Sabinus' slaves did come into the picture at some stage when he says that they were charged with Sabinus,[67] and it can fairly be supposed that the evidence on which those charges were based had been extracted from the slaves at a *servorum quaestio*.

The last-known appearance of the defamation category during Sejanus' ministry is the most apposite of all. It concerns the disturbances instigated by or on behalf of Agrippina and Nero in 29. The senate having met to debate the reception of certain charges lodged against these two members of the imperial house, there was a serious outbreak of popular unrest, with the populace parading the images of the accused around the senate-house in a demonstration, according to Tacitus, of loyalty to the *domus Caesaris* as a whole, against the outsider Sejanus.[68] The debate was adjourned without a decision on the charges being reached. Thereupon fictitious attacks on Sejanus, purporting to have been composed by consulars, began circulating, anonymity having encouraged many authors to exercise their talents more boldly: ‚ferebantur etiam sub nominibus consularium fictae in Seianum sententiae, exercentibus plerisque per occultum atque eo procacius libidinem ingeniorum',[69] where ‚fictae sententiae' evidently means opinions falsely represented to have been expressed in the senate by consulars during the debate on a *receptio inter reos*. These attacks infuriated Sejanus and gave him fresh grounds of accusation. He now alleged that the senate had spurned the emperor's anger at the injuries perpetrated by Agrippina and Nero; that the people had defected; that seditious speeches and fictitious decrees of the senate were being propagated; and that all that remained was for the people to take up arms and choose as their leaders those whose images they had brandished like banners: ‚unde illi ira violentior et materies criminandi: spretum dolorem principis ab senatu, descivisse populum; audiri iam et legi

[66] Cf. Tac. Ann. 4.68.4 ff.: Latiaris compliments Sabinus on his loyalty to Germanicus' family and speaks well of Germanicus and Agrippina; Sabinus bursts into tearful complaints, whereupon Latiaris ventures to attack Sejanus' cruelty, arrogance and ambition; not even Tiberius is spared abuse; and, friendly relations having been thus established, Sabinus seeks Latiaris out regularly.

[67] Plin. *N. H.* 8.145: ‚in nostro aevo actis p. R. testatum Appio Iunio et P. Silio coss., cum animadverteretur ex causa Neronis Germanici fili in Titium Sabinum et servitia eius.' On the chronological problems (‚ex causa Neronis') see Furneaux, 1.571; Rogers, *Studies in the Reign of Tiberius*, 1943, 57 ff.; Koestermann, *TA* 2.205 f.

[68] Tac. *Ann.* 5.3.4–4.3.

[69] Ib. 5.4.4.

novas contiones, nova patrum consulta: quid reliquum nisi ut caperent ferrum et, quorum imagines pro vexillis secuti forent, duces imperatoresque deligerent?'[70] The important point about this passage, apart from its graphic and unique portrayal of just how defamation could be linked with sedition, is that in Sejanus' contention *maiestas p. R. minuta* had resulted directly from the circulation of pamphlets *ad infamiam Seiani.* The outcome was that Tiberius issued an edict rebuking the populace; he also reproached the senate for having allowed itself to be dissuaded from acting on his original letter of accusation, pointing out that it was because of the delay that disturbances had broken out and imperial majesty held up to public ridicule ('imperatoria maiestas elusa publice foret'). He directed that the whole case be reserved for his decision.[71]

Whatever other charges there were against Agrippina and Nero,[72] it can reasonably be supposed that the pseudonymous attacks on Sejanus were laid at their door. The *senatus consultum* of A. D. 6 was aimed, amongst others, at instigators – 'si quis dolo malo fecerit, quo quid eorum fieret'[72a] –, and there was more than enough proof of the defendants' contumacy and readiness to listen to seditious advice from agents of Sejanus (including the recommendation that they embrace the statue of Divus Augustus in the Forum).[73] As for the public ridicule of *imperatoria maiestas,* this most probably alludes to the flaunting of the defendants' images 'pro vexillis', an act that denigrated the *imagines imperatoris* which formed second standards for the legions, alongside the eagles. We thus seem to have in this case a rare example of both verbal and real injuries being perpetrated in circumstances of realistic danger to the security of the state.

There is one other matter concerning Sejanus' use of the *lex maiestatis.* Velleius says that it was in natural imitation of the elevation of men like Marius, Cicero and Asinius Pollio to high office that the senate and the Roman people were induced to summon as the guardian of their security the man whom they considered best suited to the task: 'haec naturalis exempli imitatio ... senatum et populum Romanum eo perduxit, ut, quod usu optimum intellegit, id in tutelam securitatis suae libenter advocet.'[74] Is Velleius speaking technically when he says that a *tutela securitatis rei publicae* was entrusted to Sejanus? The participation of senate and people certainly seems to imply a formal act, and one thinks of

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[70] Ib. 5.4.5.

[71] Ib. 5.5.1. And on the delaying tactics of Junius Rusticus, 5.4.1 f.

[72] Cf. ib. 5.3.3 f.

[72a] Ch. II, Passage A.

[73] Tac. Ann. 4.12.5 ff.; 4.59.5–60.4. Cf. ch. IV at nn. 104–5.

[74] Vell. 2.128.4.

the *cura et tutela rei publicae universa* offered to (but declined by) Augustus,[75] but it is scarcely possible even to conjecure the nature of the powers that might have been conferred on Sejanus.[76] One would not like to think that anyone other than the emperor could be given the benefit of a discretionary clause such as that attested by the *lex de imperio Vespasiani*,[77] nor is an omnibus *maiestas* clause of the type putatively enacted for Nero and Domitian[78] conceivable for Sejanus, and the only safe conclusion is that Velleius is expressing his admiration for Sejanus' systematic exploitation of the *lex maiestatis* in somewhat exaggerated terms. The uneasy feeling remains, however, that if we knew more about Sejanus' ministry we might know more about his *tutela securitatis rei publicae.*

3. Some leading cases, A. D. 32–35

The years following the fall of Sejanus saw a great many cases of verbal treason, and also a substantial advance by *renuntiatio amicitiae* towards assimilation with the *crimen maiestatis*. The guiding spirit in the cases of the period was Macro, Sejanus' successor in the praetorian prefecture. The period ends with an unequivocal death sentence for defaming Tiberius in what appear to have been completely non-seditious circumstances.

The trials of 32 include the prosecution launched by C. Sestius against Q. Servaeus and Minucius Thermus.[79] The charge, which was brought at the express request of Tiberius, was connected with the defendants' friendship with Sejanus,[80] but defamation obviously came into it somehow, because Tacitus makes this case the occasion of a short excursus on the widespread evil of accusations at this time and the dangers involved in saying anything to anyone anywhere.[81] The

[75] See Bauman, *CM* 226 n. 89.

[76] This passage is not noticed by H. U. Instinsky, *Sicherheit als politisches Problem des römischen Kaisertums*, Baden-Baden, 1952, nor does it seem to have been discussed elsewhere.

[77] *FIRA* 1.154 ff. at 156.

[78] Ch. VI at nn. 101, 217.

[79] Tac. *Ann.* 6.7.2 f.

[80] ‚Modeste habita Seiani amicitia.'

[81] Ib. 6.7.3: ‚quod maxime exitiabile tulere illa tempora, cum primores senatus infimas etiam delationes exercerent, alii propalam, multi per occultam (= as *mandatores*); neque discerneres alienos a coniunctis, amicos ab ignotis, quid repens aut vetustate obscurum (= the immunity of the *crimen maiestatis* to prescription): perinde in foro, in convivio, quaqua de re locuti incusabantur, ut quis praevenire et reum destinare properat, pars ad subsidium sui, plures infecti quasi valetudine et contactu.' Cf. Sen. *Ben.* 3.26.1. ‚In convivio' (‚ebriorum sermo' in Seneca) is untrue. Cf. ch. III n. 228. See also Dio 58.14.1–16.7.

accused were condemned, but saved themselves by turning informer.[82] It was also at this time that the *eques Romanus* M. Terentius was acquitted of a charge of *Seiani amicitia*.[83] The case is important because of the admonition that Tacitus has the accused address to the senate, reminding it that there is a difference between fulfilling the demands of *amicitia* and plotting against the emperor or the state.[84] Another friend of Sejanus, L. Caesianus, would have got into trouble for ridiculing Tiberius' baldness at the Floralia if the emperor had not intervened,[85] which further illustrates how *iniuriae* to the emperor were being exploited to bring down Sejanus' associates.

Perhaps the most instructive trial in 32 is that of Sextus Vistilius. He had been a close friend of Tiberius' brother Drusus, and had been received into *amicitia* by Tiberius after Drusus' death. He was now alleged to have written something attacking Caligula's morals, and for this he was excluded from the emperor's society (‚convictu principis prohibitus')[86] – reputedly a lesser punishment than the full *renuntiatio amicitiae*[87] but scarcely so regarded by Vistilius, who made a vain attempt to regain the emperor's favour and committed suicide.[88] In contrast with this case, Cotta Messalinus was in the same year subjected to a public criminal charge for a similar attack on Caligula (as an *inlustris*[89]), but was saved by the intervention of Tiberius.[90] In the last resort the retention or otherwise of the emperor's friendship was more important than anything the delators might do.

Renuntiatio amicitiae was again prominent in 34. When Pomponius Labeo, a former imperial legate of Moesia, committed suicide in that year, Tiberius informed the senate that the deceased had been facing charges of provincial misconduct and other charges (‚male administratae provinciae aliorumque criminum urgebatur'[91]); he had renounced Labeo's friendship by forbidding him

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[82] Tac. Ann. 6.7.5.

[83] Ib. 6.8.1–11, 9.1.

[84] Ib. 6.8.11: ‚insidiae in rem publicam, consilia caedis adversum imperatorem puniantur: de amicitia et officiis idem finis et te, Caesar, et nos absolverit.' But Tiberius' own sentiments did not differ from these: Terentius was acquitted.

[85] Dio 58.19.1 f.

[86] Tac. *Ann.* 6.9.2 ff.

[87] So Furneaux, 1.606; Koestermann, *TA* 2.260.

[88] Tac. *Ann.* 6.9.4.

[89] It was not *iniuria magistratui*, for Caligula did not hold his first magistracy – the quaestorship – until 33. Cf. Balsdon, xvii.

[90] Tac. *Ann.* 6.5. On this case see also ch. IV at n. 192.

[91] Koestermann, *TA* 2.310 retains the *urgebatur* of the MS. Furneaux, 1.630 reads *arguebatur*.

his house, something for which there was ample ancestral precedent, but Labeo had killed himself in order to give the impression that the renunciation had driven an innocent man to his death; and he had persuaded his wife to die with him, although she had not, despite her guilt, been in any danger.[92]

This case, involving a renunciation at a time when criminal charges were pending, seems to be a close parallel to Cornelius Gallus. On what facts was the *renuntiatio* based? Did *male administratae provinciae* (= *male gesta re publica* = *maiestas*[93]) underlie the private complaint as well as the public charge, or was there a different ground for the former? Tacitus does not give a reason for the renunciation, but the whole tenor of his account makes it quite certain that it was based on the same acts as the public criminal charges. This case thus represents a departure from the policy enunciated at Cn. Piso's trial in two respects: the same offence was now attracting a double penalty, and the common issue was virtually being prejudged by the *renuntiatio*. In other words, in Piso's case Tiberius had carefully refrained from sitting in judgment on the *renuntiatio* while the criminal trial was pending (‚*si* ... laetatus est, odero') even though the issues of fact had not been the same, but now he was not only deciding the question of renunciation before the criminal trial but was doing so on a common issue.

The trial of Mamercus Aemilius Scaurus in 34 is also, on a proper construction, a case involving *renuntiatio amicitiae*. The charges against Scaurus are obscurely attested. Tacitus avers, in an account immediately following the suicide of Pomponius Labeo, that Scaurus was now charged for the second time[94] but that his downfall had nothing to do with his friendship with Sejanus; it was due to the enmity of Macro, who used the same techniques as Sejanus, but more

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[92] Tac. *Ann.* 6.29.1–3.

[93] Cf. *Tac. Ann.* 1.72.3: ‚male gesta re publica maiestatem populi Romani minuisset.' The charge of improper receipt of money against both Labeo and his wife attested by Dio 58.24.3 is not necessarily a reference to Tacitus' charge of *male administratae provinciae:* it can just as well be one of the *aliorum criminum.* Tacitus is more likely to have named the *maiestas* charge and left the others anonymous than the reverse, especially as he introduces this case with a typical *maiestas* signal: ‚at Romae caede continua Pomponius Labeo ... sanguinem effudit.' Tac. *Ann.* 6.29.1. Moreover, Labeo's wife, although charged with him on the pecuniary count attested by Dio, had according to Tac. *Ann.* 6.29.3 been ‚etsi nocentem periculi tamen expertem', which means guilty on the pecuniary count but not implicated in the *maiestas* count which spelt *periculum* for Labeo himself. Brunt, 225 leaves the question open. A *maiestas* charge is expressly denied by Shotter, o. c. (n. 41) 655, but unconvincingly.

[94] On the first time see Tac. *Ann.* 6.9.5 ff., although he discloses little more than the fact that Scaurus earned a black mark from Tiberius.

deviously (‚qui easdem artes occultius exercebat'). [95] This clear pointer to the defamation category is reinforced by Tacitus' assertion that Macro had lodged a charge concerning the theme of a tragedy written by Scaurus and had included in the indictment some verses capable of being construed as a reflection on Tiberius: ‚detulerat argumentum tragoediae a Scauro scriptae, additis versibus qui in Tiberium flecterentur.' [96] However, adds Tacitus, the charges lodged by the actual accusers, Servilius and Cornelius, were adultery with Livilla (widow of Drusus) and magical practices: ‚verum ab Servilio et Cornelio accusatoribus adulterium Liviae, magorum sacra obiectabantur.' [97] Scaurus anticipated condemnation by suicide, in which he was joined by his wife. [98]

Dio is broadly to a similar effect. He says that Scaurus was convicted because of a tragedy which he had written under the title of *Atreus* in which one of that ruler's subjects was advised, in the manner of Euripides, ‚to tolerate the folly of his ruler'. [99] When Tiberius heard of it he declared that it was an attack on him, since his bloodthirstiness qualified him as Atreus; he added that ‚he would make him an Ajax', and drove Scaurus to suicide. However, says Dio, Scaurus was not charged with this, but with adultery with Livilla. [100] This superb example of the doctrine of the unnamed victim was too much for Suetonius, if his poet who was charged with defaming Agamemnon in a tragedy [101] is a reference to this case. [102]

Tiberius' threat ‚to make Scaurus an Ajax' was an extraordinarily apt one, alluding – as we may safely suppose it did – to the fact that Ajax's impiety (which included verbal injury [103]) had brought upon him a renunciation of friendship by Agamemnon [104] (son of Atreus, but that does not excuse Suetonius)

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[95] Ib. 6.29.5.

[96] Ib.

[97] Ib. 6.29.6.

[98] Ib. 6.29.7.

[99] Dio 58.24.3 f. Cf. Eur. *Phoen.* 393.

[100] Dio 58.24.4 f.

[101] Suet. *Tib.* 61.3: ‚obiectum est poetae, quod in tragoedia Agamemnonem probris lacessisset.' Cf. perhaps Dio 59.19.2.

[102] One hopes it is. The alternative, the subsumption of Divus Agamemnon under the *lex maiestatis*, is too awful to contemplate.

[103] Soph. *Ai.* 767–77 and esp. 774 f.: ἄνασσα, τοῖς ἄλλοισιν Ἀργείων πέλας ἴστω, καθ' ἡμᾶς δ' οὔποτ' ἐκρήξει μάχη.

[104] Ib., the dialogue between Agamemnon and Odysseus on the latter's request for a right of burial for Ajax, and esp. 1372–73: οὗτος δὲ κἀκεῖ κἀνθάδ' ὢν ἔμοιγ' ὁμῶς ἔχθιστος ἔσται. σοὶ δὲ δρᾶν ἔξεσθ' ἃ χρῄς. Which is, in effect, what Tiberius said to D. Silanus on his return to Rome in A. D. 20.

which had driven him to suicide.[105] But the fact that the suicidal potential of *renuntiatio amicitiae* was realised in Scaurus' case as it had been in the cases of Sextus Vistilius and Pomponius Labeo is only part of the importance of Scaurus' case. The combined effect of Tacitus and Dio is that the *nominis delatio* by Macro was lodged before Tiberius knew of the offensive tragedy; when he did learn of it he threatened *renuntiatio amicitiae* but vetoed any further public criminal steps in connection with the tragedy; and charges of adultery and magic were then substituted.[106] But neither of these charges was a serious enough threat to drive Scaurus to suicide. Dio virtually says as much; Tacitus' ‚damnationem anteiit'[107] is surely a reflection of the effect of the renunciation on to the public criminal charges; and, most cogently of all, Scaurus' wife would not have been an associate in a suicide prompted by her husband's adultery.[108] Equally important is Macro's attempt to bring a public criminal charge before Tiberius even knew that he had been injured – a far cry from the emperor's consultation of Livia before giving a decision on the charge relating to defamation of her in Appuleia Varilla's case. There were some who had given careful thought to the anomalies pointed out by Ateius Capito in 22 and had come to the conclusion that the time was ripe for the complete absorption of *iniuriae* to the emperor into the public criminal law.

The case of Fulcinius Trio in 35 has a bearing on the question of the *lex maiestatis* and testamentary freedom of speech. Trio, accused of complicity with Sejanus,[109] anticipated condemnation by suicide, but only after he had written out a will in which he made a virulent attack (‚multa et atrocia') on Macro and on some of Tiberius' leading freedmen, adding for good measure that Tiberius was senile and that his prolonged absence was tantamount to exile (a favourite theme).[110] Trio was taking full advantage of Augustus' veto of a law

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[105] In Sophocles Ajax's suicide is due to his remorse at having wanted to kill his comrades, but Calchas makes it clear, 749–79, that the insult to Athena is the main cause of the trouble. Insults, this time to the Greek leaders, are given by Menelaus as one of the reasons for refusing burial to Ajax, 1081–3, 1087-90.

[106] That there was not a *receptio inter reos* on Macro's charge is shown by the reservation of the term *accusatores* for Servilius and Cornelius.

[107] Tac. *Ann.* 6.29.7.

[108] Most of the wives who got into trouble with their husbands did so in respect of their husbands' activities as provincial governors. See the examples cited by Furneaux, 1.433. Dio 58.24.3 notes with surprise that Mam. Scaurus had neither governed a province nor accepted bribes. The only other well-known non-gubernatorial suicide pact is Arria and Caecina Paetus, on which see Furneaux, 2.472.

[109] Tac. *Ann.* 6.38.1 f. Cf. Dio 58.25.2 f.

[110] Tac. *Ann.* 6.38.2. Cf. *Suet.* Tib. 59.1.

de inhibenda testamentorum licentia,[111] and it is worth noting that this is one of the few occasions on which Tacitus gives the actual substance of a libel.[112] The inclusion of some of Tiberius' freedmen among Trio's targets is also of interest. Which law was Trio evading in their case, the *lex Julia* or the *lex Cornelia*? If the former, this will be a very early example of the elevation of imperial freedmen to the status of *inlustres;* and if the latter, our *iudicium publicum* under the *lex Cornelia* receives further corroboration.

The most curious part of Trio's will is the fact that Tiberius insisted on its being read, despite the heirs' attempt to conceal it. Tacitus' explanation for this is that Tiberius wanted either to demonstrate his tolerance and indifference to *infamia* or to reveal the truth and avoid a repetition of his state of ignorance during Sejanus' ascendancy.[113] But neither of these theories will do. It is a bit late in the day to credit Tiberius with indifference to insult,[114] and as for the suggestion that Tiberius was now enlisting *famosi libelli* in the service of imperial policy by disclosing them rather than by suppressing them, this inverted *lex maiestatis* would not have had much point unless it had given the same immunity to the words of the living as to those of the dead. The only feasible explanation[115] is that Tiberius was foreshadowing the policy soon to be instituted by Caligula, of setting aside defamatory wills by posthumous declarations of *intestabilis esse*.[116] Tiberius did not actually have Trio's will set aside, but he made its reading a warning against abuse of the privilege sanctioned by Augustus.

The cases of Granius Marcianus, who committed suicide when charged with

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[111] Suet. *Aug.* 56.1. Cf. ch. II n. 44.

[112] Suetonius is less diffident. Cf. the catalogue in Suet. *Tib.* 59.

[113] Tac. *Ann.* 6.38.3.

[114] The right time for this is selected by Suetonius. Cf. n. 4.

[115] The tradition concerning the curses called down by Drusus (son of Germanicus) on Tiberius' head and their communication to the senate after Drusus' death is part of the record of everything that he had said and done during his incarceration (Tac. *Ann.* 6.24.1 ff.) and is too confused to make any useful contribution to the elucidation of Trio's posthumous attack. Suetonius, *Tib.* 54.2, *Cal.* 7 i. f., has Drusus adjudged a *hostis* by the senate on Tiberius' accusation – exactly what would have resulted from the posthumous charges of *infensum rei publicae animum* attested by Tacitus loc. cit., except that in Suetonius the trial takes place in Drusus' lifetime. Dio 58.3.8 has Drusus' wife charge him in A. D. 30, which may be the *probra corporis* part of Tacitus' charges. Tacitus is out of court if one accepts the late origin for posthumous judgments premised by E. Volterra, ‚Processi penali contro i defunti in diritto romano', *RIDA* 2 (1949), 485 ff., but of course Volterra is out of court if one accepts the early origin premised by Tacitus.

[116] Ch. VI sec. 2.

maiestas, and Tarius Gratianus, who was condemned to death *lege eadem*, are not expressly said by Tacitus to have been for verbal injury, but in his context it is a safe assumption that they were.[117] We are not informed of any special circumstances warranting the supreme penalty in Gratianus' case, but the case of Sextius Paconianus which follows (still in A. D. 35) gives some insight into the considerations that decided these matters. Paconianus was strangled in prison ‚ob carmina illic in principem factitata'.[118] He had previously been in trouble in 32, when Tiberius had accused him of having been implicated with Sejanus in a plot to kill Caligula;[119] the charge would have resulted in Paconianus' execution if he had not turned informer against L. Latiaris, whom we remember as the accuser of Titius Sabinus.[120] Paconianus' consignment to the prison where he met his end three years later may have been in commutation of sentence, or it may simply have been in order to impose restraints on a danger to the public peace.[121] In either event he stands out as an unruly character whose persistent libels (‚factitata') made it possible for his enemies to demand the death sentence.

4. ‚Defertur impietatis in principem'

Under A. D. 37 Tacitus informs us that a certain Albucilla, the former wife of Satrius Secundus and a notorious courtesan, was charged with *impietas in principem* and that a number of prominent men were charged with her, as accomplices and co-adulterers: ‚Albucilla ... defertur impietatis in principem; conectebantur ut conscii et adulteri eius ...'[122] This cryptic statement is all that Tacitus chooses to make about the factual basis of his last Tiberian treason trial and his one and only *impietas*. He displays the same reticence, we recall, about the charge of *inreligiose dicta* against Appuleia Varilla. Fortunately, however, a solution to the problem of Albucilla's crime is within reach.

Our first step towards clarification is made possible by Suetonius' reference to Cn. Domitius, one of the accused in the case, as ‚maiestatis ... et adulteriorum

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[117] Tac. *Ann.* 6.38.4, following Trio's case and immediately before 6.39.1 (‚nec dispares Trebelleni Rufi et Sextii Paconiani exitus'). On Paconianus see below.

[118] Ib. 6.39.1.

[119] Ib. 6.3.4.

[120] Ib. 6.3.4–4.1.

[121] Commutation: Rogers, *Trials* 157. No explanation: Furneaux, 1.599; Koestermann, *TA* 2.246. Imprisonment as a definitive punishment was rare but known. Mommsen, *Strafr* 963; Mayer-Maly, *Kl. P.* 1.1053 f.

[122] Tac. *Ann.* 6.47.2.

incestique reus'.[123] We conclude from this that there is no need to entertain the possibility of Tacitus' ‚conscii et adulterii eius' being a hendiadys, and we are accordingly relieved of the impossible task of attempting to explain how the adulteries of a non-member of the imperial *domus* could have been elevated to treason. Assuming, then, that it is simply a question of some *maiestas* category with which we are already familiar, are we in a position to say which it is? A possible clue is provided by Tacitus' ‚Albucilla, cui matrimonium cum Satrio Secundo coniurationis indice fuerat'.[124] This is usually taken as a reference to the fact that Satrius Secundus had exposed the conspiracy of Sejanus;[125] in other words, ‚Satrio ... indice' is merely descriptive, and has no bearing on the factual basis of the charges against Albucilla. It has, however, been argued by F. B. Marsh that the reference is to a conspiracy of Albucilla and her associates,[126] and although this proposal is not acceptable in the sense intended by its author, since a plot to overthrow an emperor who was already moribund[127] is too much even for imperial politics, it can possibly be used in a modified sense. There is no compelling reason why *coniurationis index* should be attached to Satrius' name as some sort of Homeric epithet six years after the fall of Sejanus, especially as Tacitus makes no reference to it on the more apposite occasion of the trial of M. Terentius in 32, when he still refers to Satrius as one of the recently overthrown Sejanus' creatures;[128] nor is the special epithet known to Seneca, to whom Satrius is one of Sejanus' *acerrimi canes.*[129] It is therefore worth asking whether this *coniuratio* is not perhaps of the same kind as that which Seneca attests when he characterises the adulteries of the elder Julia as ‚filia et tot nobiles iuvenes adulterio velut sacramento adacti'.[130] That *coniuratio* had given rise to charges in which the notion of impiety had been prominent (the *laesarum religionum ac violatae maiestatis* case), and it is now in the context of another coterie of adulterers that Tacitus uses the actual word *impietas,* and incorporates it in the same sentence as a *coniuratio.* There is ample room for the suggestion that these coteries represent a particular manifestation of a widespread and long-standing

[123] Suet. *Ner.* 5.2. The charges have been diversely understood in the literature. See Ciaceri, 297; Rogers, *Trials* 164; Walker, *Annals of Tacitus* 265; Avonzo, *Senato* 114; Koestermann, *TA* 2.354; Kunkel, *Senat* 59 n. 96.

[124] *Ann.* 6.47.2.

[125] Furneaux, 1.652; Syme, *Tacitus* 2.753; Koestermann, *TA* 2.354.

[126] Marsh, 307 f. Cf. Walker, o. c. 265, 267. For the general (non-juristic) background to the case see P. Y. Forsyth, ‚A Treason Case of A. D. 37', *Phoenix* 23 (1969), 204 ff.

[127] Tac. *Ann.* 6.46.5, 9; 6.47.4. Suet. *Ner.* 5.2.

[128] Tac. *Ann.* 6.8.10.

[129] Sen. *Ad. Marc.* 22.4 f.

[130] Sen. *Brev. Vit.* 4.5. Cf. Bauman, *CM* 200.

phenomenon,[131] that they were associations of rebellious spirits meeting together to commit adultery and to sharpen their wits on the foibles of the world in general and the emperor in particular.[132] It is not without significance that Vibius Marsus, one of the accused, was an orator of some note, may have had pretensions as a poet, and during the trial attempted to starve himself to death[133] in the tradition of Cremutius Cordus, the paradigm martyr in the cause of freedom of speech. Another accused, L. Arruntius, was known for his outspokenness,[134] and a third, Cn. Domitius, was a frequenter of wild parties[135] whose wife, the younger Agrippina, would gladly have condoned his adulteries if they had been accompanied by vilifications of Tiberius. In this setting another misconception about ‚Albucilla, cui matrimonium cum Satrio Secundo coniurationis indice fuerat' can be cleared up. ‚Cui matrimonium fuerat' is generally thought to mean that Satrius had died,[136] but in the context of an adultery charge it is much easier to suppose that he had divorced Albucilla in order to exercise his preferential right of accusation against her.[137] The activities of the school for defamation and adultery had come to Satrius' notice, and he had passed on the information concerning the defamatory attacks to the authorities and had then divorced

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[131] Thus Ter. *Hec.* 198: ‚quod hoc genus est, quae haec est coniuratio mulierum?' We note especially the passages on the Bacchanalian affair. Thus Livy 39.14.8: ‚ut quaestio de iis habeatur, qui coierint coniuraverintve, quo stuprum flagitiumve inferretur.' Ib. 39.15.9 f.: ‚mulierum magna pars est, et is fons mali huiusce fuit; deinde simillimi feminis mares, stuprati et constupratores, fanatici, vigiliis, vino, strepitibus clamoribusque nocturnis attoniti. nullas adhuc vires coniuratio, ceterum incrementum ingens virium habet, quod in dies plures fiunt.' Ib. 39.16.3 is important: ‚adhuc privatis noxiis, quia nondum ad rem publicam opprimendam satis virium est, *coniuratio* sese *impia* tenet.' Livy's use of *coniuratio* here is supported by the *S. C. De Bacchanalibus* itself (*FIRA* 1.241): ‚neve post hac inter sed coniourase ... velet.' Hyg. *Fab.* 15 p. 507 is also important: ‚Lemniades ... Veneris impulsu coniuratae genus virorum omne interfecerunt.' And, on the cognate word *sacramentum*, Plin. Ep. 10.96.7: ‚carmen Christo quasi deo dicere secum invicem seque sacramento non in scelus aliquod obstringere, sed ne ... adulteria committerent.'

[132] Cf. G. Charles-Picard, *Auguste et Neron*, Hachette, 1962, 120: ‚La „conspiration de Julie" s'apparente bien plus aux scandales gratuits commis par de jeunes aristocrates dévoyés ou des voyous asociaux qu'à un putsch revolutionnaire.' The same holds good for Albucilla and her friends.

[133] Tac. Ann. 6.48.1. Cf. Koestermann, *TA* 1.393, 2.355 f.

[134] Tac. *Ann.* 1.13.1.

[135] Suet. *Ner.* 5.1.

[136] Syme, *Tacitus* 1.406 n. 11, 2.753; Koestermann, *TA* 2.354.

[137] On divorce as a condition precedent to the husband's action against either the wife or the co-adulterer see *Dig.* 48.5.12.10, where the rule is wide enough to make a dissolution of the marriage necessary even where the charge is brought by a stranger after the expiry of the husband's preferential right.

Albucilla and instituted an *accusatio adulterii* against her. Thereafter someone else, acting in conjunction with Macro,[138] brought charges of *maiestas* on the basis of the attacks on Tiberius, and in this regard it will be noticed that at this point of his narrative Tacitus says only that ‚Albucilla ... defertur impietatis in principem'; the adultery charge is referred to elsewhere in his account.[139]

The case had an inconclusive ending.[140] The record of the interrogation of witnesses and examination under torture of slaves at which Macro had presided was forwarded to the senate, but the absence of any letter from the emperor incriminating the accused gave rise to the suspicion that most of the charges had been concocted while he was ill and probably unaware of what was going on, and that they had been inspired by Macro's well-known hostility towards Arruntius.[141] The proceedings were adjourned. Cn. Domitius continued with the preparation of his defence and Vibius Marsus and L. Arruntius attempted suicide, the latter successfully.[142] Albucilla also tried to kill herself, but failed, and was imprisoned by order of the senate.[143] Tacitus ends his account with the introduction of three further accused, but only on the adultery charges; of these Carsidius Sacerdos and Laelius Balbus were sentenced to deportation, and Pontius Fregellanus to loss of senatorial status.[144] Dio, reporting what seems to be Albucilla's case, has Tiberius die at Misenum before learning of the case and implies that his death saved some of the accused.[145] But Suetonius, in what may

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[138] Cf. below at n. 141.

[139] It is close by in 6.47.2, but further away in 6.47.6. It can be deduced from the interrogation of slaves attested by Tacitus that the adultery charges were lodged earlier than the *impietas in principem* charge and were granted a *receptio inter reos* while the latter was still pending. See ch. VII at nn. 19–21.

[140] See also ch. VII at nn. 19–21.

[141] Tac. *Ann.* 6.47.4: ‚sed testium interrogationi, tormentis servorum Macronem praesedisse commentarii ad senatum missi ferebant, nullaeque in eos imperatoris litterae suspicionem dabant, invalido ac fortasse ignaro ficta pleraque ob inimicitias Macronis notas in Arruntium.'

[142] Ib. 6.48.1 f.

[143] Ib. 6.48.6.

[144] Ib.

[145] Dio 58.27.1–28.1: Charges were lodged by Macro in 36, but Thrasyllus persuaded Tiberius to hold the matter over. In 37 when the accused contradicted evidence given under torture the senate postponed the case. A certain woman (= Albucilla) attempted suicide and was imprisoned, and died in prison. L. Arruntius took his own life. The rest were saved, some after condemnation but before the ten days' interval had expired and others because the news of Tiberius' condition caused a further postponement. Tiberius died at Misenum without knowing of these happenings. See also ch. VI n. 65.

be an account of this case, reproaches Tiberius for dying without rescinding the death sentences that had already been inflicted on some of the accused.[146]

Is the *impietas in principem* attested by Tacitus an authentic reflection of the terminology used in the charge? All the indications are that it is. It is certainly not a stylistic variant, for up to this point Tacitus has used the word *maiestas* with reference to treason thirty-one times[147] without needing a synonym; nor is there any reason to think that he specially wanted one after the adjacent ‚maiestatis postulaverat' of *Ann.* 6.47.1, for elsewhere he tolerates two or more adjacent occurrences with no apparent discomfort.[148] It is not difficult to guess what happened here. In Mam. Scaurus' case Macro had endeavoured to institute a prosecution for verbal treason without the knowledge of the injured party, Tiberius, but the emperor had vetoed this and had confined himself to *renuntiatio amicitiae*. With Tiberius on his deathbed Macro now saw another opening for the same tactic, and in order to strengthen his hand as much as possible he gave the charge the solemn name of *impietas in principem*. The senate, undoubtedly mindful of Tiberius' ruling in Mam. Scaurus' case, refused to accept the charge without a directive from the emperor, but Macro deserves full marks for trying. He practised, as Tacitus says, the same arts as Sejanus, but more deviously.

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[146] Suet. *Tib.* 73.1 has Tiberius tell the senate that an informer has named certain accused, but the senate dismisses the case without even hearing the accused, drawing from Tiberius the complaint that he has been held in contempt. This is shortly before Tiberius' death, and if it is Albucilla's case it contradicts Tacitus and Dio on some material points. Elsewhere, *Tib.* 75.2, Suetonius alludes to *damnati* for whom the ten days' interval expired on the very day the news of Tiberius' death was received: in the absence of Caligula there was no one who could act and they were strangled. Dio's only casualties are Albucilla and Arruntius, while Tacitus only has Arruntius. If Albucilla was condemned and executed after her attempted suicide, she may be the *damnata* whom Suetonius has inflated to a number of *damnati* in order to support the attack on Tiberius in *Tib.* 75.2 f. They even blamed him for dying.

[147] Tac. *Ann.* 1.72.3 (bis); 1.72.4; 1.74.1; 1.74.7; 2.50.1 (bis); 2.50.2; 2.50.4; 3.22.4; 3.24.3; 3.37.1; 3.38.1; 3.38.2; 3.44.3; 3.50.6; 3.66.2; 3.67.3; 3.70.2; 4.6.3; 4.19.5; 4.21.3; 4.30.3; 4.31.7; 4.34.3; 4.42.3; 5.5.1; 6.9.5; 6.18.1; 6.38.4; 6.47.1.

[148] E. g. 1.72.3 (bis), 1.72.4; 1.74.1, 1.74.7; 2.50.1 (bis), 2.50.2, 2.50.4; 3.38.1, 3.38.2.

VI. IMPIETAS IN PRINCIPEM: THE EMPEROR: A. D. 37–96

1. Caligula: Some general principles

The notable defamation trials of Caligula's reign include the banishment of Carrinas Secundus for attacking tyrants in a rhetorical exercise[1] (the case of the unnamed victim, as with Mam. Scaurus' attack on Tiberius); the burning alive in the arena of a writer of Atellan farces who had included an ambiguous line in one of his pieces;[2] the strange case of Domitius Afer, who erected a statue to Caligula and added an inscription to the effect that he was in his twenty-seventh year and that he had already attained the consulship for the second time, was charged with criticising the emperor's youth and irregular attainment of office,[3] and narrowly avoided condemnation;[4] and the death sentence inflicted on Seneca – but afterwards remitted – for arguing a case well in the senate while Caligula was present.[5]

Domitius Afer may have been regarded as having diminished *maiestas p. R.* by casting aspersions on the judgment shown by the electoral authority in the selection of magistrates as well as on the suitability of this particular magistrate, so that the legal basis of the case is not noticeably esoteric. But Domitius was saved by his readiness to acknowledge Caligula as his master in the art of forensic oratory,[6] and this introduces a different element. Caligula had something of a reputation as a forensic orator, and specially prided himself on his superiority to Seneca.[7] He used to write replies to successful forensic speeches and

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[1] Dio 59.20.6.

[2] Suet. *Cal.* 27.4.

[3] There is no indication that Domitius was also charged with erecting the statue itself, although Suetonius' assertion (*Cal.* 34.1) that Caligula forbade the erection of any statue to any living man anywhere without his consent (‚vetuit posthac viventium cuiquam usquam statuam aut imaginem nisi consulto et auctore se poni') suggests that such a charge could have lain if he had not consented to the statue.

[4] Dio 59.19.1–7.

[5] Ib. 59.19.7 f.

[6] Ib. 59.19.4–7.

[7] Tac. *Ann.* 13.3.5.

draw up accusations and defences for the purposes of prominent trials in the senate,[8] and it may be supposed that Seneca's offence was that he had won his case not only in Caligula's presence but against the product of his pen. Words were now being penalised because they were not bad.

Seneca had, in effect, overridden a *responsum* of Caligula's, and in the light of that emperor's claim to *divina maiestas*[9] it is quite possible that the charge was based on the *neque fas infringere dicta eius* rule laid down by Tiberius in respect of the *responsa* of Divus Augustus.[10] It is therefore unnecessary to interpret a case such as this as evidence of a special legislative authorisation outside the rules that we have already studied. In this regard, the *ius arbitriumque omnium rerum* which Suetonius says was granted to Caligula by senate and people[11] was, if anything, an extra-judicial power rather than a judicial;[12] and although the fact that Caligula put up a bronze tablet recording his restoration of the *crimen maiestatis*[13] raises a natural suspicion that some new propositions may have been included[14] (a law of C. Iulius Caesar Augustus Germanicus would presumably still have been a *lex Julia*), the long line of denials of efficacy *lege* to *principalis maiestatis veneratio* is decisively against any such suspicion.

Caligula's execution of Ptolemy of Mauretania for appearing at a spectacle wearing a purple cloak[15] is presumably an aspect of *divina maiestas* (Caracalla's *paludamentum* was a cult object[16]). There are other curious examples of what the sources are pleased to call Caligula's insane jealousy, but which we may prefer to see as the forerunners of subsequent developments. Thus, Caligula's threat to remove the busts of Vergil and Livy from all libraries[17] is the lineal ancestor of Domitian's uneasiness at Mettius Pompusianus' choice of reading-matter[18] and is prompted by the same desire of the autocrat not to be exposed to invidious comparisons with the leaders of the past. Another example is Caligula's threats to the jurisconsults to see to it that they gave no *responsa* except in accordance with his wishes. In Suetonius' opinion this implied that he was

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[8] Suet. *Cal.* 53.
[9] Ib. 22.2.
[10] Cf. ch. IV at n. 65.
[11] Suet. *Cal.* 14.1.
[12] Marongiu, pass.
[13] Cf. ch. VIII at n. 108.
[14] Suspicion becomes certainty to Balsdon, 150 f., but see below.
[15] Suet. *Cal.* 35.1.
[16] Cf. ch. IV at n. 121.
[17] Suet. Cal. 34.2.
[18] Cf. ch. III at nn. 80–85.

going to do away with the practice of jurisprudence altogether,[19] but a better explanation is that the jurists were not over-enthusiastic about *divina maiestas*[20] and that the emperor conceived the idea of coercing them by making *responsa* which contradicted imperial pronouncements a reflection on the author of the latter[21] – not directly provable, but by no means out of place in a sequence ranging from the inviolable *responsa* of Divus Augustus, via the sacred ordinances of Domitian[22] and the rescript of Severus Alexander specially reviving the *lex maiestatis* in order to punish a judge who gave judgment contrary to an imperial constitution,[23] to the entrenchment of imperial legislation behind the penalties for *sacrilegium* in the later empire,[24] none of which is nearly as remote from the defamation category as, for example, the forensic skill that earned a charge of *maiestas* for Seneca. Our proposition cannot be put more highly than a conjecture, but if the efficacy of imperial rescripts goes back ultimately to their quality as inviolable *responsa* of the emperor it will have been the defamation category's most striking institutionalising function of all.

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[19] Suet. 10c. cit.: ‚de iuris quoque consultis, quasi scientiae eorum omnem usum aboliturus, saepe iactavit se mehercule effecturum ne quid respondere possint praeter eum.' ‚Eum' may be corrupt (So Schulz, *Hist. Rom. Leg. Science*, Oxford, 1946, 113 n. 3 – but see Bleicken, 139 n. 3), but Naber's reading (*ap.* Schulz), ‚praeter „eu!" is not a cure: ‚quasi ... aboliturus' is an inference based on specific facts, but ‚praeter „eu!" does not supply those facts.

[20] C. Cassius Longinus (*procos. Asiae* 40/1) was subsequently no friend of the Principate. Tac. *Ann.* 16.7.3, 9.1, 22.8. A striking example would be P. Sulpicius Scribonius Proculus, if he was the son of the senator whom Caligula caused to be lynched in the senate (so Kunkel, *Herkunft* 127) and if he was the Proculus of the *Digest* (so, but only speculatively, Kunkel, o. c. 127 f.).

[21] Schulz, o. c. 113 takes the Suetonius passage to imply Caligula's refusal, or only rare grant, of the *ius respondendi*. Kunkel, o. c. 289 n. 612 refrains from speculating on Suetonius' meaning.

[22] So perhaps the ‚sacra imperia' of Stat. *Silvae* 5.1.207 cited by Scott, 101 f. Cf. ‚iudiciorum caelestium', Quint. *Inst. Orat.* 4 pr. 2.

[23] *CJ* 9.8.1.

[24] See the constitutions listed in the Index of Clyde Pharr, *The Theodosian Code*, Princeton, 1952, 636 s. v. *sacrilege, crime of* and esp. *CTh* 6.5.2 (= *CJ* 12. 8.1); 7.4.30 (= *CJ* 12.37.13), where *divalium scitorum* are constitutions of the reigning emperors, not of Divi; 11.29.5; 11.30.6; 16.2.25 (= *CJ* 9.29.1), with its ambiguous ‚qui divinae legis sanctitatem ... violant' (on which see Pharr, o. c. 444 n. 75); 16.2.47. Add *CJ* 9.29.2 (‚disputari de principali iudicio non oportet: sacrilegii enim instar est dubitare, an is dignus sit, quem elegerit imperator' – cf. Quintilian, n. 22); *Coll.* 15.3.2, on which see Bauman, *CM* 70.

2. Caligula: The querela inofficiosi testamenti and maiestas

It is possible that the policy of seeking the emperor's institution as heir in large estates, a policy that originated with Caligula,[25] owes its existence to the *crimen maiestatis*. The typical case is that attested for Caligula and Domitian (and possibly for Nero as well)[26] whereby if a testator had said that he intended to make Caesar his heir and had not done so, the will was set aside. This is clearly reminiscent of the *querela inofficiosi testamenti* of the private law,[27] but it cannot be supposed that the emperor availed himself of that action as such, in view of the clear proof in the sources of his employment of public criminal process. Caligula tried such cases in person, and Suetonius has him nominate in advance the sum that he intends to raise at each sitting; on one occasion he boasted of having condemned more than forty separate defendants (‚ex diversis criminibus') in a single judgment.[28] In Nero's case Suetonius includes three measures in one and the same passage: confiscation of five-sixths of the estates of freedmen who without reasonable cause assumed the name of any family with which the emperor was connected;[29] forfeiture to the *fiscus* of the estates of those who proved themselves ungrateful to the emperor, and the punishment of the *studiosi iuris* who had written or dictated their wills;[30] and the subsumption under the *lex maiestatis* of any word or deed, provided only that a delator came

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[25] No instance earlier than Caligula is known. The case of Fulcinius Trio, ch. V at nn. 109–16, is not such a case. – The problems here discussed have, in respect of some aspects, been subjected to a penetrating examination by Gaudemet, *Pietas*. The matter had previously been considered by Rogers, ‚The Roman emperors as heirs and legatees', *TAPA* 78 (1947), 140ff., but no conclusions germane to our purpose emerge from Rogers' paper. Gaudemet partly foreshadows one of the writer's findings, namely the possible involvement of the *pater patriae*, but neither for this nor for the notion of *pietas erga principem* on which he also relies does Gaudemet sufficiently clarify the juristic basis; in particular, he does not deal with the public criminal charge involved in the proceedings.

[26] Suet. *Cal.* 38.2: ‚testamenta primipilarium ... rescidit; item ceterorum ut irrita et vana quoscumque quis diceret herede Caesare mori destinasse.' *Dom.* 12.2: ‚confiscabantur alienissimae hereditates vel uno exsistente, qui diceret audisse se ex defuncto, cum viveret, heredem sibi Caesarem esse.'

[27] On which see Buckland, 327ff. – On the proposition in the text cf. Gaudemet, *Pietas* 128ff.

[28] Suet. *Cal.* 38.3.

[29] This is the forerunner of the Domitianic *maiestas sacri nominis*, on which see Taeger, 344f. See also at n. 142.

[30] ‚(Instituit) ut ingratorum in principem testamenta ad fiscum pertinerent, ac ne impune esset studiosis iuris, qui scripsissent vel dictassent ea.'

forward.[31] Suetonius gives the impression (‚instituit ut ... ut ... ut') that three separate measures are involved, in which case the first and second are not necessarily connected with *maiestas* at all, but in fact the third measure looks much more like a tendentious generalisation from the first two.[32] The same phenomenon of an apparent general *maiestas* clause within a discussion of forfeited estates is introduced by Suetonius in a passage dealing with Domitian, but here too it gives every appearance of being a generalisation.[33] In the case of all three emperors Suetonius introduces the subject of wills with the observation that the emperor concerned was in dire financial straits and in search of new ways to raise money,[34] but these fund-raising campaigns are not discussed until well after his main accounts of the *maiestas* trials of Caligula and Domitian,[35] so that at least in the case of those emperors it is a fair inference that Suetonius is describing the engagement of the *lex maiestatis* in the specific matter of inofficious testaments rather than injecting a generalisation from *maiestas* cases discussed by him in earlier chapters into a completely irrelevant context.[36]

There is possible support for Suetonius in Pliny. In the course of a description of the *querela inofficiosi testamenti* brought by Asudius Curianus against certain heirs instituted by his mother, Pomponia Galla, in preference to himself, Pliny says that when the day of trial in the Centumviral Court drew near the heirs became anxious to settle, not because of any weakness in their case but from distrust of the times, because they were afraid that, as had happened to many, from being defendants in a Centumviral action they might end up as the accused on a capital charge: ‚verebantur, quod videbant multis accidisse, ne ex centumvirali iudicio capitis rei exirent.' There were some among them, adds Pliny, whose friendship with Gratilla and Rusticus might be held against them.[37] This last, an allusion to the leading trial for verbal treason in Domitian's reign,[38]

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[31] Suet. *Ner.* 32.2. On the *maiestas* clause see below.

[32] See at nn. 101–14 below.

[33] See also at n. 217 below.

[34] Suet. *Cal.* 38.1: ‚exhaustus igitur atque egens ad rapinas convertit animum vario et exquisitissimo calumniarum et auctionum et vectigalium genere.' *Calumniae* are here, as often, ‚charges of *maiestas*'. *Ner.* 32.1: ‚exhaustus et egens ... calumniis rapinisque intendit animum.' *Dom.* 12.1: ‚exhaustus ... nihil pensi habuit quin praedaretur omni modo.'

[35] Caligula's trials are mainly concentrated in Suet. *Cal.* 24–30, and those of Domitian in *Dom.* 10–11.

[36] On the case of Nero see at nn. 101–14 below.

[37] Plin. Ep. 5.1.6 ff.

[38] See at nn. 165–77 below.

makes it clear that the capital charge feared by the heirs was one of *maiestas*, and the implication is that by going to court one drew attention to the will in question and invited intervention by the emperor.[39]

The particular *maiestas* category involved in these testamentary invalidations is either the general concept of impiety, the breach of a duty presumptively owing to the *pater patriae*, or it is the verbal injury category – or perhaps a combination of both. The *pater patriae* was perfectly capable of enlisting the *crimen maiestatis* in his defence even without an appropriate extension of a statutory category, and his involvement here agrees well with certain features of the *querela inofficiosi testamenti*, especially the fact that *impietas* (in the private law sense) was the underlying notion of the *querela*.[40] But that there was also an involvement of the defamation category is suggested by the prominence given by Suetonius to the type of case in which a witness comes forward to testify to the deceased's declaration of intent during his lifetime. Such evidence was not adduced for the purpose of giving effect to the true intention of the testator (even if the rule laid down in the *Causa Curiana* still applied, the emperor did not rectify – he rescinded), nor was it needed for the claim of the *pater patriae:* if a parent had rights it was *qua* parent, not because of expressions of intent. The evidence can, however, be comfortably accomodated in a defamation situation. The failure to institute the emperor was construed as a tacit assertion by the testator that he no longer considered the emperor a fit and proper person to be named as heir, that he considered him a *turpis persona.* This interesting application of the unnamed victim rule was later broadened so as to cover mere omission from the will, without any evidence of a previous statement of intent. For example, when Domitian was instituted in Agricola's will he was as elated as if he had secured a verdict of honourable acquittal,[41] on which Tacitus comments acidly – but the comment confirms that the emperor's character was at risk – that only bad emperors were named as heirs.[42] As for the way in which a charge of this sort was framed, it will have sought an order deeming the will never to have been made. For this purpose *intestabilis esse* could be imported into the *lex Julia maiestatis* from the *senatus consultum* of A. D. 6 easily enough, although it is curious that exactly the same presumption underlay the *querela inofficiosi testamenti:* ‚cum contra testamentum ut inofficiosum iudi-

[39] The heirs would have been liable because they had published the will – ‚si quis scripserit composuerit ediderit.'

[40] *Dig.* 5.2.2: ‚recte quidem fecit testamentum, sed non ex officio pietatis.'

[41] Tac. *Agr.* 43: ‚laetatum eum velut honore iudicioque.'

[42] Ib.: ‚a bono patre non scribi heredem nisi malum principem.'

catur, testamenti factionem habuisse defunctus non creditur.'[43] There were no watertight compartments in Roman law.

The hypothesis here presented amounts in effect to the holding of posthumous *maiestas* trials and gives such trials a much earlier origin than current opinion would allow;[44] it also requires such trials to have been held in ‚less serious' cases, which perhaps goes further than even the most devoted protagonist of *Dig.* 48.4.11 might wish.[45] But the proceedings were undoubtedly posthumous, they were not (except for the *studiosus iuris* who drew the will and the heirs) aimed at any culpable party except the deceased, and they were almost certainly under one of the public criminal laws. Consequently, unless a better case can be made out for some other *lex*[46] the hypothesis must be accounted an arguable one. It was a long way from the disturbances of A. D. 6 and 8 to this precursor of the modern death duties tax, but so far the *lex maiestatis* had been able to realise its diverse objectives without doing serious violence to legal logic.

3. Nero: Verbal injury under the lex Cornelia

The *lex maiestatis* was in abeyance from the beginning of Nero's reign to A. D. 62, and if two prosecutions for verbal injury can be dated to the period of abeyance, as the evidence suggests they can, there will be an irresistible inference that they were *lege Cornelia de iniuriis* rather than *lege Julia maiestatis,* thus providing strong confirmation of our postulated *iudicium publicum* under the *lex Cornelia.*

The cases in question are in Suetonius.[47] The one is that of Isidorus the Cynic, who shouted to Nero in public that ‚he was good at singing about the ills of Nauplius, but not at looking after his own property' (‚quod Naupli mala bene cantitaret, sua bona male disponeret'). The other concerns Datus the Atellan

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[43] *Dig.* 5.2.17.1.

[44] See for example Volterra, *RIDA* 2 (1949), 485 ff. Cf. however ch. V. n. 115.

[45] Cf. ch. I at n. 53.

[46] There is no reason to think of the *lex Cornelia testamentaria* (on which see Mommsen, *Strafr* 670 ff.) in this regard. – The charges brought by Commodus against persons who failed to name him as heir are not sufficiently described by *SHA Vit. Com.* 5.14 to enable the *lex* to be identified. It is worth noting that the sort of case we have been discussing is palpably not attested for emperors who were firm in their abolitions of charges of *maiestas.* Cf., on emperors who adopted a liberal policy towards their institution as heirs, Gaudemet, *Pietas* 122 ff. and esp. 125 ff.

[47] Suet. *Ner.* 39.3.

actor, who mimed the acts of drinking and swimming while singing a song beginning ‚Farewell father, farewell mother', thus alluding, as Suetonius points out, to the deaths of Claudius and Agrippina; he ended his song with the words ‚Orcus guides your steps', at the same time pointing to the senate-house – clearly, although Suetonius does not say so, an attack on the *patres* as well as on the emperor. The punishment of Isidorus and Datus was banishment from Rome and Italy (‚urbe Italiaque summovit'), and in Suetonius' opinion these sentences were exceptionally mild, either because Nero was indifferent to insults or because he did not want to encourage them by showing annoyance.[48]

The chronological setting of these cases is important. Suetonius notes three events in the following order: a great autumn plague, the destruction of two settlements in Britain, and a serious setback in Armenia. He then expresses surprise at the fact that through all this (‚inter haec') Nero showed himself tolerant of abuse, and especially of injurious words and pamphlets (‚qui se dictis aut carminibus lacessissent').[49] Suetonius next cites some examples of the many Greek[50] and Latin pamphlets that were being posted up or circulated (‚multa Graece Latineque proscripta aut vulgata sunt'), the themes being Nero's murder of Agrippina (including Νέρων Ὀρέστης Ἀλκμέων μητροκτόνος), his lyric achievements and the domination of the state by his *domus*.[51] Nero, adds Suetonius, made no attempt to seek out the authors, and when some of them were reported to the senate by an informer he forbade severe punishment: ‚sed neque auctores requisiit et quosdam per indicem delatos ad senatum adfici graviore poena prohibuit.' The cases of Isidorus and Datus follow.

Suetonius has assembled all the ingredients of covert pamphleteering, including the typical crisis situation, but his sequence is extraordinary. The correct chronology is as follows: the great autumn plague was in 65, the British disaster (Camulodunum and Verulamium) was in 61, and the Armenian setback was in 62.[52] Most important of all, the Greek pamphlet quoted above is also cited by Dio, except that he assigns it to its proper place, namely A. D. 59 in the imme-

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[48] Ib.

[49] Ib. 39.1.

[50] The extensive use of Greek by the pamphleteers may help to explain the ἐπιγράμματα of the *s. c.* of A. D. 6. Cf. ch. II, Passage B.

[51] Suet. *Ner.* 39.2.

[52] There is a great plague in 65 in Tac. *Ann.* 16.13.1 ff., where ‚vastata Campania turbine ventorum', plus Tacitus' allocation of the plague to the closing stages of 65, makes an autumn plague secure. On the British and Armenian troubles see Tac. *Ann.* 14 31 ff.; Dio 62.1.1; Tac. *Ann.* 15.7 ff.

diate aftermath of Agrippina's death.[53] Dio quotes the tag in connection with his assertion that charges began being lodged against those who were accusing Nero of responsibility for his mother's death, but that Nero would not allow such charges to be accepted, either because he did not want to encourage the rumour by reacting to it or because he was indifferent to what people said.[54] Which is, of course, Suetonius' comment on the sentences of Isidorus and Datus and points strongly to 59 as the date of their cases. Corroboration is supplied by the fact that Isidorus criticised Nero's administration of his property, for it was precisely in 59 that Nero's expenditures were, according to Dio, the subject of much comment.[55] The evidence clearly favours the suggestion that Isidorus and Datus were dealt with in 59, and under the *lex Cornelia*.

4. Nero: ‚Tum primum revocata ea lex'

The great riddle of the *lex maiestatis* in Nero's reign is not so much his abuse of that statute as his considerable avoidance of it. This applies above all to the defamation category. It was not only because they were *lege Cornelia* that the cases of Isidorus and Datus were conducted with moderation, for it is not easy to point to any occasion on which Nero made vigorous or sustained use of the corresponding category under the *lex maiestatis*. We cannot, of course, endorse R. S. Rogers' assertion that the case of Antistius Sosianus is ‚the sole reported conviction for *maiestas* which is not high treason' in Nero's reign,[56] for there is ample proof of other convictions of the sort that Rogers has in mind, not only in the cases of Fabricius Veiento and Claudius Timarchus but also, to take only one example,[57] in the case of the philosopher Annaeus Cornutus, who in 65, 66 or 68 was sentenced to *deportatio in insulam* for saying that if Nero's proposed epic covered 400 books no one would read it, and for comparing Nero's work unfavourably with that of Chrysippus.[58] But it has to be admitted that there are some very disquieting features.

The revival of the *lex maiestatis* in 62 furnishes the first unmistakable pointer

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[53] Dio 61.16.2[2] (8.70 Cary).

[54] Ib. 61.16.3.

[55] Ib. 61.18.1 f.

[56] Rogers, ‚The Tacitean Account of a Neronian Trial', *Studies Presented to David M. Robinson*, St Louis, 1953, 2.711 ff. at 715.

[57] For numerous other examples see at nn. 84–100 below.

[58] Dio 62.29.2 f. Dio's date is the end of 65. The others are deduced from Jerome's chronology. Cf. v. Arnim, *RE* 1.2225; Strzelecki, *Kl. P.* 1.1555.

to a lukewarm attitude on Nero's part. The occasion was the trial of Antistius Sosianus[59] on a charge of composing defamatory verses about Nero and reciting them at a dinner-party given by Ostorius Scapula: ‚probrosa adversus principem carmina factitavit vulgavitque celebri convivio dum apud Ostorium Scapulam epulatur.'[60] Tacitus specially notes that this was the first revival of the statute: ‚exim a Cossutiano Capitone ... maiestatis delatus est. tum primum revocata ea lex.'[61] It was thought, says Tacitus, that the purpose of the prosecutor was not so much to ruin Antistius as to enable Nero to gain credit by vetoing the anticipated death sentence.[62] But the senate refused to do what was expected of it. Junius Marullus, the consul designate, proposed the deposition of Antistius from his praetorship and his execution *more maiorum*, but this was opposed by Thrasea Paetus, who argued that the death penalty was obsolete and that penalties which did not redound to the discredit of the age were available under the *leges;* he therefore proposed a sentence of *deportatio in insulam* and confiscation of property.[63] Thrasea was doing precisely what M. Lepidus had tried to do at the trial of Clutorius Priscus, he was avoiding the death penalty (under the XII Tables) by proposing the application (or in this case, the revival) of the *lex maiestatis.* This motion was carried, but the consuls decided to consult Nero before venturing to act on it. After some delay Nero issued a rescript to the following effect: Antistius had insulted him grossly and without provocation; an appropriate sentence should have been imposed, but since he would in any event have vetoed severity he would not stand in the way of leniency now; they were

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[59] A determined attack on Tacitus' account of this case is mounted by Rogers, o. c. (n. 56), on the basis of similarities with the trials of Clutorius Priscus and the Catilinarians. The arguments are not convincing. Rogers' trump card, the fact that in all three cases the first proposal on sentence is made by the consul designate, is refuted by Aulus Gellius 4.10.1 f.: ‚ante legem quae nunc de senatu habendo observatur, ordo rogandi sententias varius fuit: alias primus rogabatur qui princeps a censoribus in senatum lectus fuerat, alias qui designati consules erant.' Cf. Mommsen, *Staatsr* 3.973 n. 2.

[60] Tac. *Ann.* 14.48.1.

[61] Ib. 14.48.2 f.

[62] Ib. 14.48.3.

[63] Ib. 14.48.4–7 and esp.: ‚non quidquid nocens reus pati mereretur, id egregio sub principe et nulla necessitate obstricto senatui statuendum disseruit: carnificem et laqueum pridem abolita et esse poenas legibus constitutas quibus sine iudicum saevitia et temporum infamia supplicia decernerentur. quin in insula publicatis bonis ... publicae clementiae maximum exemplum futurum.' It is not clear why Garnsey, 105 and n. 4 finds it difficult to locate the occasion on which, according to Dio 62.15.1 a, ‚a certain Thrasea gave it as his opinion that the maximum penalty for a senator was exile'. Dio is obviously referring to Antistius' case.

to decide as they saw fit, and were even at large to acquit if so minded. The senate decided to abide by its decision.[64]

Nero's rescript is an important document. The consuls' decision to consult the emperor is a statement of the obvious if all that it means is the invocation of the usual ten days' rule,[65] but it takes on a different colour in the light of the fact that this was the first revival of the *lex* since its abolition by Claudius twenty-one years before. The consuls were seeking a ruling on the revival, and it was because of the important considerations of policy that this involved that Nero delayed his reply,[66] not because he was annoyed at the leniency of the sentence, as Tacitus tries to suggest. Nero was putting the optimum case for a revival of the *lex:* an *iniuria atrox* to the emperor, and no extenuating circumstances (‚nulla iniuria provocatum Antistium gravissimas in principem contumelias dixisse'). He was saying to the senate, in effect: ‚Here is a text-book case. I, although the injured party, do not propose making a ruling, and I stress your right to give whatever verdict you will. If you stand by your condemnation you will be reviving the *lex maiestatis,* but if you decide on acquittal the *lex* will remain in abeyance. In either event the decision will be yours.' The man who had promised to keep his *domus* separate from the *res publica*[67] did not wish to be accused of having broken that promise.

Nothing in Antistius' record marks him out as a particular enemy of the regime,[68] and one might be inclined to attribute Nero's lack of enthusiasm to that fact, and to see Tigellinus rather than Nero as the instigator of the revival: Tacitus' assertion that the accuser, Cossutianus Capito, brought the charge as a service to his father-in-law, Tigellinus,[69] might be interpreted to mean that the latter was beginning to think along the same lines as Sejanus and Macro, his predecessors in the praetorian prefecture and in the controlled use of the *lex maiestatis.* But the evidence does not support such a conclusion. The revival

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[64] Tac. *Ann.* 14.49.1 f. and esp.: ‚at consules perficere decretum senatus non ausi de consensu scripsere Caesari.' Ib. 14.49.3 ff. and esp.: ‚ille inter pudorem et iram cunctatus, postremo rescripsit nulla iniuria provocatum Antistium gravissimas in principem contumelias dixisse; earum ultionem a patribus postulatam et pro magnitudine delicti poenam statui par fuisse. ceterum se, qui severitatem decernentium impediturus fuerit, moderationem non prohibere: statuerent ut vellent, datam et absolvendi licentiam.'

[65] Cf. ib. 3.51.3: ‚ne decreta patrum ante diem decimum ad aerarium deferrentur idque vitae spatium damnatis prorogaretur.'

[66] Considered decisions were a feature of Nero's administration of justice. Suet. *Ner.* 15.1. Tacitus here draws an unfair inference from the delay.

[67] Tac. *Ann.* 13.4.2.

[68] Cf. Ib. 16.14.1; 16.21.2; *Hist.* 4.44.

[69] Ib. 14.48.2.

was admittedly followed, in the same year, by the cases of Fabricius Veiento and Claudius Timarchus – both cases involving defamation of the senate rather than of the emperor –, but over the period A. D. 63–65 not a single charge of verbal injury is attested.[70] The most alarming part of all is the apparent inactivity of the defamation category during the great conspiracy of Piso in 65 when, if ever, a fact-finding device ought to have been urgently needed.

There are only four possible connections with verbal injury in the whole of Tacitus' long account of the Pisonian conspiracy. One is Afranius Quintianus, who was the subject of a defamatory poem by Nero and joined the conspiracy in order to avenge the insult[71]: he could presumably have replied with a *tu quoque*, but not with any forensic remedy.[72] A second connection is that of Seneca, who before he died dictated a treatise which Tacitus refrains from summarising because of its availability in published form,[73] which probably means that there was no book-burning decree against Seneca.[74] A third link is the considerations that drew M. Annaeus Lucanus into the conspiracy. Tacitus says that Lucan had a personal motive, in as much as Nero's literary pretensions had driven him to ward off competition from Lucan by vetoing publication of the latter's work: ‚Lucanum propriae causae accendebant, quod famam carminum eius premebat Nero prohibueratque ostentare, vanus adsimulatione.'[75] It is of course arguable that a ban on the publication of a work that may not have

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[70] Except if Dio's date for Cornutus' case is correct. Cf. n. 58. And even then it was after the Pisonian conspiracy, on which see below. See also at nn. 81–2.

[71] Tac. *Ann.* 15.49.5.

[72] In Antistius' case Nero stressed the fact (n. 64) that the accused was ‚nulla iniuria provocatum'. Presumably if he had been ‚iniuria provocatus' he could have retaliated with impunity, although strictly speaking there was no exact compensation between an injury to the state and an injury by the emperor. The problem seems to have been canvassed in the Severan period, judging by the analysis attributed to Cassius Clemens by Dio 75.9.1–3. There was certainly no other remedy, whether by civil action or criminal charge, open to Quintianus, since the emperor's immunity was absolute. Cf. Dio loc. cit. See also Suet. *Ner.* 33.2.

[73] Tac. *Ann.* 15.63.7.

[74] Dio 62.25.2 rejects Tacitus' picture of Seneca dictating to his scribes as his life's blood ebbs away, and has him defer opening his veins until he had revised the book (βιβλίον) on which he was engaged and deposited his other works with some friends, for fear that they would fall into Nero's hands and be destroyed. Some idea of what might have been contained in the lost last words of Seneca is obtainable from *Ann.* 15.67.2–4, where Tacitus summarises the last words of Subrius Flavus and says that he is doing so precisely because they were not, unlike those of Seneca, published. (How, then, did Tacitus get hold of them?)

[75] Tac. *Ann.* 15.49.3.

differed greatly from Cremutius Cordus in its view of the Principate[76] presupposes legal machinery for the enforcement of the ban, but as the work had probably already been published in a first edition[77] there will not have been any hidden facts to be uncovered and the *lex Cornelia de iniuriis* could have provided a sufficient sanction. The crucial link with verbal injury is the fourth one. Tacitus notices the intensity of Nero's desire to see the consul Vestinus Atticus charged as an accomplice in the conspiracy, and adds that one of the reasons for Nero's animosity was the frequent crude jokes by which Vestinus had held him up to ridicule (‚saepe asperis facetiis inlusus'); but, says Tacitus, with neither charge nor accuser forthcoming Nero was unable to play the judge, and turned to terror: ‚igitur non crimine, non accusatore existente, quia speciem iudicis induere non poterat, ad vim dominationis conversus.'[78] What is the meaning of this? A charge of conspiracy as such would, according to Tacitus, have had no hope against Vestinus,[79] but why was Tigellinus not able to find an accuser to capitalise on Vestinus' offensive remarks, and why did Nero choose to get rid of Vestinus by *vis dominationis*[80] rather than by way of the *lex*?

Dio seems to have been aware of the anomalies, for in his account of the conspiracy he makes a valiant attempt to supply the sort of situation that we are looking for: ‚Whatever could be charged against anyone in respect of excessive joy or grief, words or signs, was dragged up and believed. Even fictitious charges won acceptance because of the things that Nero had actually done. False

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[76] Cf. perhaps Fuhrmann, *Kl. P.* 3.747, esp. on Lucan's sympathy with Cato. See also Furneaux, 2. Intr. 77.

[77] Cf. Koestermann, *TA* 4.269; Fuhrmann, *Kl. P.* 3.745 f.

[78] Tac. *Ann.* 15.68.4, 69.1.

[79] Ib. 15.68.3 f.: ‚opperiebatur Nero ut Vestinus quoque consul in crimen traheretur, violentum et infensum ratus: sed ex coniuratis consilia cum Vestino non miscuerant.' Perhaps so, but why not employ the time-honoured procedure to make sure? Another ground of *iniuria* that Nero may have failed to capitalise on for his much-needed *crimen* is Vestinus' recent marriage with Statilia Messalina, who counted Nero amongst her adulterers. Tacitus *Ann.* 15.68.5 notes the marriage as a further motive for Nero's desire to destroy Vestinus, but does not suggest that it in any way formed the subject of a charge. It ought to have been able to do so, however, in view of Caligula's banishment of Piso (nominal leader of the conspiracy against Nero) and his wife, Livia Orestilla, for having resumed cohabitation after Caligula had seized her at her very wedding ceremony with Piso, married her, kept her at his house for a few days, and then divorced her. So Suet. *Cal.* 25.1, although Dio 59.8.7 says that the charge against Piso and Livia was adultery during the subsistence of her marriage to Caligula.

[80] Tac. *Ann.* 15.69.1 ff.: Nero sent troops to occupy Atticus' house and overpower his retainers. Atticus committed suicide.

friends and domestic slaves flourished in profusion.'[81] It would, however, be more reassuring if Dio had been more specific, and if he had not borrowed so patently from the tradition for the death of Drusilla and for the case of Granius Marcellus.[82] Furthermore, his old trouble with dates plagues him again, leading him to insert the cases of Thrasea Paetus and Barea Soranus, which in fact date well into 66, in the midst of the conspiracy trials of 65. Nor is it possible to test Dio against Suetonius, for the latter has surprisingly little to say about the conspiracy.[83]

The problem is aggravated by the relative abundance of cases of verbal treason after 65, compared with the virtual drought of 63–65. In 66 Curtius Montanus, a co-accused of Thrasea Paetus, was charged with writing defamatory verses (‚detestanda carmina factitantem'), to which the defence replied that a young man of integrity, innocent of defamatory versification, was being forced into exile because of his ability: ‚Montanum probae iuventae neque famosi carminis, quia protulerit ingenium, extorrem agi.'[84] Montanus was spared for his father's sake, on condition that he took no part in public life.[85] The rider probably means that the terms of a *renuntiatio amicitiae* were incorporated in the verdict (cf. D. Silanus), but it does not mean that there were no public criminal proceedings at all: the case is sandwiched between the undoubted public criminal sentences imposed on some of Montanus' co-accused in the Thrasea Paetus case and the rewards to the accusers in that case,[86] and it is a safe inference that Montanus had been in jeopardy on a charge of treason.

Words may have been used, also in 66, to build up a case against C. Petronius.[87] Tigellinus, wishing to charge Petronius with friendship with Scaevinus (one of the Pisonian conspirators), but apparently lacking the necessary evidence, induced one of Petronius' slaves to furnish information.[88] Petronius made for Campania, where Nero happened to be, and was detained at Cumae. He decided, however, not to await trial[89] and opened his veins, leaving a will in which

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[81] Dio 62.24.3 f.

[82] Cf. ch. IV at nn. 204–5, 44.

[83] Suet. *Ner.* 36.1 f.

[84] Tac. *Ann.* 16.28.2, 29.3.

[85] Ib. 16.33.4.

[86] Ib. 16.33.2 ff.

[87] In all probability the author of *Satyricon*, although there are difficulties. See Furneaux, 2.448, 450; Koestermann, *TA* 4.367, 370; Syme, *Tacitus* 2.538.

[88] Tac. *Ann.* 16.18.5.

[89] Bleicken, 93 ff., 115 f. does not list this as a possible case in the emperor's court, but it is either that or Petronius' condemnation by the senate followed by his visit to Nero to ask him not to ratify the sentence.

he listed Nero's deviations together with the names of the men and women with whom he had practised them.[90] He sent this document to Nero and then broke the seal, so that it should not be used to incriminate others[91] (= for the purpose of composing defamatory statements *sub alieno nomine*?[92]).

The passage dealing with the corruption of Petronius' slaves reads as follows: ‚amicitiam Scaevini Petronio obiectans, corrupto ad indicium servo ademptaque defensione et maiore parte familiae in vincla rapta.' Tacitus' sequence is correct. It was *before* the formulation of the *amicitia* charge that the series of events comprised in the ablative absolutes took place: the corruption of the slaves, the cutting off of the defence and the arrest of the household. On the face of it there is an anomaly, since Petronius could not have been deprived of the chance to defend himself[93] before the formulation of the *amicitia* charge, but if notice is taken of Plutarch's assertion that Nero had previously resented Petronius' sarcasm[94] a perfectly viable sequence appears: the employment of Petronius' previous witticisms as the basis of a charge of verbal treason, a *receptio* on that charge, access to the willing slave, the discovery of evidence of *amicitia Scaevini* which cut the ground from under Petronius' feet, and the arrest of the rest of the *familia*. This is the sort of case that ought to have figured prominently in the trials of 65, especially in the proceedings against Vestinus Atticus.

Nero was gravely embarrassed by the disclosures in Petronius' will. He began casting round for the source of Petronius' knowledge, and hit upon Silia, a senator's wife and Nero's long-standing collaborator. She was exiled for revealing her observations and experiences.[95] Her disclosures were on a par with those

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[90] Tac. *Ann.* 16.19.1 ff.

[91] Ib. 16.19.5. Lucan's seal had been so used. Ib. 16.17.5.

[92] At the end of his reign Nero was tried *(in absentia)*. Vittinghoff, 99 f. But what were the charges? Vittinghoff loc. cit. simply avers that the senate had to choose between ‚dem legitimen Herrscher und dem mächtigen Usurpator' and so made Nero a *hostis*. But if there was any semblance of judicial procedure there must have been charges, and in any case how powerful was Galba? A general allegation of ‚Amtsverbrechen' is no doubt possible, but if anything more specific was wanted the ‚adsimilatis Lucani litteris' which Nero had resorted to because he was ‚opibus eius inhians' (Tac. *Ann.* 16.17.5) could have been drawn upon.

[93] ‚Adempta defensione' should not be taken in a technical sense. There is no trace of such a rule, even in *CTh* 9.14.3. The rule denying the accused legal representation in *maiestas* cases is not the same thing. Bauman, *Lex Quisquis* 55 with lit. The meaning in the text is that the evidence of the slave made Petronius realise that his case was hopeless, as C. Silanus had realised in 22.

[94] Plut. *De Disc. Adult. et Am.* p. 60E, cited by Furneaux 2.448.

[95] Tac. *Ann.* 16.20.1: ‚agitur in exilium tamquam non siluisset quae viderat pertuleratque, proprio odio.'

for which Ovid had been punished by Augustus, except that he had incorporated his material in a *carmen* and she had presumably communicated her information to Petronius by word of mouth. Tacitus draws a distinction between Nero's ostensible motive, the fact that she had made disclosure, and his true motive, personal animosity, which is perhaps a grudging recognition of the legitimacy of a charge of *non siluisset quae viderat pertuleratque.*

The case of Silia is linked by Tacitus with that of Minucius Thermus. The latter, says Tacitus, was given over to the vindictiveness of Tigellinus, whereas Silia had been the object of Nero's personal animosity.[96] This prepares us for a case of *iniuria Tigellini*, and it was in all probability a verbal injury, although Tacitus' language has to be scrutinised carefully in order to establish this: ‚Minucium ... Tigellini simultatibus dedit, quia libertus Thermi quaedam de Tigellino criminose detulerat, quae cruciatibus tormentorum ipse, patronus eius nece immerita luere.'[97] Furneaux[98] rejects the interpretation of Orelli (and others[99]), namely that the freedman had ‚given information of libels spoken *(sic)* against Tigellinus by Minucius', but the only alternative is the hazardous supposition that the freedman had laid a charge against Tigellinus. In that case one might have expected Tigellinus' prior removal from his praetorian prefecture, especially as Tacitus is here sufficiently sensitive to the niceties to observe that it was only when Minucius was ‚praetura functum' that he was prosecuted. Moreover, if the freedman accused Tigellinus he presumably did so falsely, in which case he would as a calumniator have suffered much more than the ‚cruciatibus tormentorum' which plainly means interrogatory torture. Finally, Tacitus' other use of *criminose* clearly implies allegations prior to the lodging of charges.[100] It is a safe assumption that Minucius Thermus was executed or committed suicide because he had defamed Tigellinus.

The full extent of the contrast between 63–65 and the subsequent period is now apparent, and the implications are disturbing. Purely on this evidence, a strong *prima facie* case could be made out for the proposition that the revival of 62 was only a temporary one and was followed by a second period of dormancy, and that it was only after the conspiracy had made the need for the proven safeguard painfully clear that the *lex* was again revived. Some of the evidence fits in with such a possibility extremely well. In particular, the omnibus *maiestas*

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[96] Tac. *Ann.* 16.20.2.

[97] Ib.

[98] 2.435.

[99] Koestermann, *TA* 4.376. Cf. M. Grant, *Tacitus*, Penguin Books, 1959, 378.

[100] Tac. *Hist.* 3.38.

clause attested by Suetonius – ‚instituit ut lege maiestatis facta dictaque omnia, quibus modo delator non deesset, tenerentur'[101] – belongs unmistakably not only to 65 but to a later part of that year than the conspiracy,[102] which *prima facie* suggests that our doubts about this decree[103] may have to be reconsidered. Moreover, Nero's general hostility to the senate[104] is consistent with his lack of enthusiasm for a law which, during its brief active career in 62, seems mainly to have served the interests of senators, and from this, too, it might be inferred that Nero did not lift his boycott of the *lex maiestatis* until he got his own version of it in 65. Also, on two subsequent occasions Tacitus repeats his information about the charges against Antistius[105] – an unusual step for an author who does not always give this much particularity even once, and possibly indicative of uncertainty about the Neronian revival in the early second century.

There are, however, counter-arguments. The terms in which Suetonius couches the omnibus *maiestas* clause are not persuasive. It is scarcely conceivable that *ut hac lege facta dictaque omnia teneantur* was formulated by a Roman legal draftsman, or that this clause was made dependent upon the arbitrary and fortuitous *quibus modo delator non deesset*. Nor does Suetonius do his case much good by omitting the *adversus maiestatem principis* which he does include in the similar clause that he attests for Domitian.[106] It is also pertinent to consider what act of legislation Suetonius means to convey by *instituit*. A clause as far-reaching as this – it would have made all other categories redundant – would have been beyond the competence of an interpretative *senatus consultum*, while a *lex* is ruled out by the insistence of the classical jurists on a single *lex*, and one not covering *principalis maiestatis veneratio*. This possibly leaves an edict of the emperor under the discretionary *maiestas* clause of a *lex de imperio Neronis*, if such there was.[107] But certain information supplied by Tacitus casts

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[101] Suet. *Ner.* 32.2.

[102] In Suet. *Ner.* 31.4, 32.1 Nero's financial straits follow the failure of the search for Dido's treasure. The date is well into 65, and is after the conspiracy. Tac. *Ann.* 16.1.3 f.

[103] Cf. at n. 32.

[104] See Suet. *Ner.* 37.3. Cf. Dio 63.15.1; 63.27.2.

[105] Tac. *Ann.* 16.14.1: ‚Antistius Sosianus, factitatis in Neronem carminibus probrosis exilio, ut dixi, multatus.' Ib. 16.21.2: ‚praetor Antistius ob probra in Neronem composita ad mortem damnabatur, mitiora censuit obtinuitque (Thrasea).' It is only in *Hist.* 4.44 that Tacitus achieves a neutral reference to Antistius.

[106] Cf. Suet. *Dom.* 10.1.

[107] For the discretionary *maiestas* clause in Vespasian's law see *FIRA* 1.156. The fact that Vespasian was given the same discretion as Augustus, Tiberius and Claudius does not necessarily mean that there was no such clause for Nero, for his omission (and that of Caligula) could be due to *memoriae damnatio*. See however n. 109.

doubt on such a decree. First, there is his attestation, in the immediate aftermath of the conspiracy, of an edict in which Nero published the evidence on which the conspirators had been condemned[108]: if Tacitus knew of this measure despite the *memoriae damnatio* that had been pronounced against Nero after his deposition,[109] he would have known of the omnibus *maiestas* decree. Second, when Salienus Clemens attempted to charge Seneca's brother, Junius Gallio, as a *hostis* and parricide the senate refused to renew the attack on what had been settled or pardoned by the emperor's clemency (‚composita aut oblitterata mansuetudine principis'),[110] which scarcely accords with a new and all-embracing clause at this time. A similar low-key posture on *maiestas* is suggested by Nero's veto of a proposal to erect a temple to Divus Nero.[111] Finally, it is reasonably certain that the Republican categories of *maiestas* were engaged in the suppression of the conspiracy,[112] and as our position throughout is based on a unitary *lex* for all categories it must be supposed that the defamation category was available at all times from 62, but just did not happen to be used. In this regard some support is provided by Plutarch's assertion that in 68 Galba did not put a stop to the free circulation in Spain of verses attacking Nero, despite attempts by Nero's procurators to persuade him to do so[113]: these particular vicissitudes of the defamation category were certainly not due to yet another abolition, and they deprive other periods of non-enforcement of some of their sting. The probabilities accordingly favour the conclusion that Suetonius is not serious about his omnibus clause, that it is a caustic generalisation from the many

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[108] Tac. *Ann.* 15.73.1.

[109] See Gualandi, 1.11 on surviving *acta Neronis* in the private law sector.

[110] Tac. *Ann.* 15.73.4.

[111] Ib. 15.74.

[112] The doctrine of manifest guilt could have deputized for *crimina* under a public criminal *lex* here, but the evidence suggests that there were both charges and defences. Thus Tac. *Ann.* 15.55.3, ‚defensionem orsus'; 15.55.5, ‚adiungere crimen'; 15.58.3, ‚dicendam ad causam'; 15.67.1, ‚ad defensionem trahens'; 15.68.3, ‚opperiebatur ... ut Vestinus ... in crimen traheretur'; Suet. *Ner.* 36.2, ‚dixere causam, cum quidam (but *not* ‚omnes') ultro crimen faterentur'. A possible anomaly is Seneca, who was sentenced to death after a *tribunus praetoriae cohortis* had gone to put Natalis' incriminating evidence to him and had conveyed his reply to Nero in the presence of Poppaea and Tigellinus, ‚quod erat saevienti principi intimum consiliorum' (Tac. *Ann.* 15.60.6 ff., 61.1 ff.) – possibly something more technical than Nero in a bad mood (cf. ch. VIII n. 154). There are other anomalous cases in Tac. *Ann.* 15.71, notably ‚infamatis magis quam convictis data exilia' and ‚reos fuisse se tantum poena experti'.

[113] Plut. *Galb.* 4.1 f.

peculiar cases known to him[114] and from the circumstances of Vestinus Atticus' case.

5. Nero: The trial of Thrasea Paetus

The charges against Thrasea Paetus in 66 raise some important questions of *iniuria*. Tacitus begins his account of the proceedings with a list of Nero's reasons for disliking Thrasea: he had walked out of the senate when a proposal to include Agrippina's birthday among days of ill-omen was under discussion; he had not been conspicuous at the Juvenalia (where Nero had often performed); he had proposed the statutory penalty against Antistius Sosianus; and he had not attended the senate when Poppaea was deified, apart from not attending her funeral.[115] Thrasea's accuser, Cossutianus Capito, remembered all these things, and also included the following matters in the indictment: Thrasea's failure, as a citizen, to take the New Year oath to the *acta* of the emperor and his predecessors and, as a priest, to associate himself with the vows for the well-being of the state and the emperor; his failure to sacrifice for the emperor's welfare or for his *caelestis vox;* and his boycott of all proceedings of the senate for the past three years, including the recent trials of L. Silanus and L. Vetus.[116] Dio does not add to these charges,[117] and Suetonius might have saved himself the trouble of mentioning the case at all.[118]

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[114] The following are some of the acts, other than those noticed in the text, from which Suetonius may have concluded that there had been an omnibus clause: the execution of Claudius' daughter, Antonia, for refusing to marry Nero; the drowning of Poppaea's son, Rufrius Crispinus, because he used to play at being a general and an emperor; the banishment of the procurator of Egypt for using the baths that had been built for Nero's visit (for the private law counterpart to this see *Dig.* 47.10.13.7); the charge of aspiring to empire preferred against Junius Torquatus because he was a prodigal and therefore deemed to be covetous of the property of others; and (although the *iniuria* connotations have been clumsily obliterated by Suetonius and Dio) the execution of Salvidienus Orfitus for having let three shops in his house near the Forum to certain *civitates*. Suet. *Ner.* 35–37; Dio 62.27.2 (p. 126 Cary, vol. viii), 27.1. It must however be said that in Caligula's case Suetonius, although furnishing lists of unusual charges of comparable size to those furnished for Nero, does not infer an omnibus *maiestas* clause.

[115] Tac. *Ann.* 16.21.1 f. Cf. Furneaux, 2.384, 454.

[116] Ib. 16.22.1.

[117] Dio 62.26.3 f.

[118] Suet. *Ner.* 37.1: ‚Paeto Thraseae (obiectum est) tristior et paedagogi vultus.' Not one of Suetonius' best efforts, and only just rescued from fatuity by Tac. *Ann.* 16.22.3: ‚habet sectatores ... qui ... habitum vultumque eius sectantur, rigidi et tristes, quo tibi

Some of the contentions that Tacitus puts into the mouths of the accusers are instructive. Cossutianus said that there was already a seditious and divisive situation, with others tending to follow Thrasea in condemning Nero's pastimes and reacting indifferently to his welfare and unsympathetically to his griefs;[119] and Thrasea's denial of Poppaea's divinity revealed the same state of mind as his refusal to swear to the acts of the Divi.[120] The co-accuser, Eprius Marcellus, in what Tacitus considered the more effective speech of the two, declared that paramount issues of state were at stake (‚summam rem publicam agi'), and amplified this with the assertion that the *patres* had been too lenient in permitting the disaffected Thrasea and others of the same persuasion, and the libellous Curtius Montanus, to ridicule them.[121] But Thrasea was not only indictable for *contumelia*, for his neglect of his obligations as a consular, a priest and a citizen made him a patent traitor and a *hostis*.[122] Finally, a special point was made of Thrasea's attitude to *senatus consulta:* ‚non illi consulta haec, non magistratus aut Romam urbem videri.'[123] Which was simply another way of saying that to disregard a *senatus consultum* was to diminish the *maiestas* of the Roman people.

Thrasea's absences from the senate are interesting. In the Republic it had been *maiestas* to refuse an office voted by the people,[124] and this notion had carried over when the imperial senate had replaced the people as the technical source of office, although the charge against Thrasea was the somewhat more general one of neglecting the *publica munera* incumbent on a consular.[125] A similar notion had been behind Caligula's execution of Julius Graecinus (Agricola's father) for disregarding an order to accuse M. Silanus,[126] and the doctrine would be put to good use by Domitian.[127] Even the people's refusal to allow Vitellius

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lasciviam exprobrent.' With Tacitus' help this act can be seen as a close replica of the pattern case under the edict *Ne quid infamandi causa fiat*, on which see Daube, pass.

[119] Tac. *Ann.* 16.22.2 ff.

[120] Cf. ch. IV at n. 213.

[121] Tac. *Ann.* 16.28.2: ‚patres, qui Thraseam desciscentem ... et Curtium Montanum ... carmina factitantem eludere impune sinerent.' See also 16.22.2, 6.

[122] Ib. 16.28.3: ‚requirere se in senatu consularem, in votis sacerdotem, in iure iurando civem, nisi contra instituta et caerimonias maiorum proditorem palam et hostem Thrasea induisset.' ‚Proditorem palam et hostem' may imply an attempt to dispense with a formal trial by invoking the doctrine of manifest guilt, but Thrasea's suicide makes it impossible to say whether the case would have been disposed of on such lines or whether the formal *crimina* would have been accepted and adjudicated upon.

[123] Ib. 16.28.6.

[124] Bauman, *CM* 104 n. 31.

[125] Tac. *Ann.* 16.27.2.

to abdicate[128] may be distantly related to the same idea, and it is evident that in all this the *crimen maiestatis* was beginning to move towards the legislation of the later empire, towards the subsumption of members of the consistory, then of senators, and finally of all grades of the imperial service under the broad umbrella of the imperial dignity.[129]

Thrasea's misdemeanours against the senate are easier to grasp than those against Nero himself. Tacitus does not list verbal injury, while Dio maintains specifically that Thrasea did not insult Nero by word or deed, but merely boycotted his performances.[130] There must, however, have been a serious attempt to work out juristic principles, because this was the one case where the onus could not be shifted to the flexible confines of *renuntiatio amicitiae*. This is not because renunciation was not used by Nero against those who stayed away from his performances – its infliction on Vespasian, probably during Nero's tour of Greece, is specially noticed[131] –, but because this remedy, or something like it, had been tried against Thrasea on two occasions without success. In 63 Thrasea had been forbidden to join the senate's pilgrimage to Antium after the birth of Poppaea's daughter, but had received the insult without emotion;[132] and in 66, apparently after the institution of the prosecution against him, he had been forbidden to join in welcoming Nero on his return from Campania, but had

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[126] Tac. *Agr.* 4: ‚studio eloquentiae sapientiaeque notus, iisque ipsis virtutibus iram Gai Caesaris meritus: namque M. Silanum accusare iussus et, quia abnuerat, interfectus est.'

[127] Cf. at nn. 174–5 below.

[128] Tac. *Hist.* 3.68 f.; Suet. *Vit.* 15.2 ff.

[129] Bauman, *Lex Quisquis* pass., discussing *CTh* 9.14.3 = *CJ* 9.8.5. The article draws attention to the fact that the Theodosian version is *Ad Legem Corneliam De Sicariis* and is only found under *Ad Legem Juliam Maiestatis* in Justinian. It is now suggested that the reason for this may well have been the need to obtain access to the slaves. No other reason suggests itself. By this time the penalties *de sicariis* were no less severe than those *de maiestate* (assuming that there ever was a difference – cf. Levy, 2.348 ff., 365 ff., 486 ff.).

[130] Dio 66.13.3.

[131] Suet. *Vesp.* 4.4: ‚peregrinatione Achaica inter comites Neronis cum cantante eo aut discederet saepius aut praesens obdormisceret, gravissimam contraxit offensam, prohibitusque non contubernio modo sed etiam publica salutatione secessit in parvam ac deviam civitatem.' Cf. ib. 14. Tacitus *Ann.* 16.5.5 has Vespasian reprimanded by Phoebus for falling asleep during a performance but saved, apparently from renunication, by influential friends. Dio 66.11.2 draws on both traditions, but retains the location in Greece on which Tacitus is silent. See also Dio 63.10.1 a (8.152 Cary), 63.17.4. Suet. *Ner.* 25.3 is also in point: ‚multis vel amicitiam suam optulerit vel simultatem indixerit, prout quisque se magis parciusve laudasset.'

[132] Tac. *Ann.* 15.23.5.

replied by a letter to Nero asking for particulars of the charges against him in order to refute them.[133] It was no good sending a man to Coventry when he liked it there, and the matter was now entrusted to the *lex maiestatis*, on the basis of Thrasea's failure to sacrifice or otherwise do homage – by attendance and applause – to the *caelestis vox:* ‚numquam pro salute principis aut caelesti voce immolavisse'; ‚quod Iuvenalium ludicro parum spectabilem operam praebuerat'.[134] This attribute of the emperor, resting ultimately on the fact that the power of speech was conceived of as possessing *maiestas*,[135] went back to 59 and the contrived enthusiasms of the Augustiani.[136] Its subsumption under the *lex maiestatis* might have been connected with the fact that as Thrasea was ‚quindecimvirali sacerdotio praeditum'[137] his failure to sacrifice was a breach of his priestly duties and thus covered by *male gesta re publica* in general,[138] but juridically speaking the divine voice must rank high among the cases that caused Modestinus to throw up his hands in despair. It was no good Eprius Marcellus trying to forge a link between this sort of neglect and sedition, for this particular criterion of loyalty had no place outside the realms of fantasy: it was, as Modestinus puts it, incapable of being evaluated *in veritate*. Tiberius had realised this when he had (following Augustan precedent[139]) forbidden the designation of his avocations as ‚divine'.[140] Nevertheless, the accusers were not entirely without resource. If the emperor's omission from a will was defamatory, so conceivably was the omission of Thrasea Paetus from the emperor's audience. The matter is perhaps made clearer by Nero's oration to the senate. Having been asked by Cossutianus not to write to the senate about Thrasea, he got his quaestor to deliver an oration in which he did not mention anyone by name but attacked the *patres* for their neglect of public duties: ‚nemine nominatim compellato patres arguebat quod publica munia desererent.'[141] By not naming names Nero had left the meaning of *publica munia* uncertain, leaving it open to someone to argue that it included a duty of homage to the divine voice. A similar duty, towards the name, may have been contended for in 67, when Sulpicius Camerinus Pythicus and his son were executed for refusing to abandon their

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[133] Ib. 16.24, 25.1.

[134] Ib. 16.22.1, 21.1.

[135] H. Wagenvoort, *Roman Dynamism*, Oxford, 1947, 106 f., 123 and n. 3.

[136] Tac. *Ann.* 14.15.8 f.; Dio 61.20.5. See also Taeger, 307 ff.

[137] Tac. *Ann.* 16.22.1.

[138] Cf. ch. I n. 15.

[139] Mommsen, *Staatsr* 2.761.

[140] Tac. *Ann.* 2.87.2.

[141] Ib. 16.27.2.

cognomen despite its impious reminiscence of Nero's Pythian victories,[142] although here a different basis is possible: *sub alieno nomine* primarily meant attaching a pseudonym to a defamatory writing, but in principle there was nothing against its extension to the case where the mere employment of another's name *was* the defamation, so that in effect the Camerini signed their death warrants every time they signed their names.

6. Vespasian and Titus

Both Vespasian and Titus abolished charges of *maiestas*, Vespasian probably and Titus certainly with the same permanence as Claudius, but the very fact that the *lex maiestatis* was not available lends point to certain episodes in their reigns.

The highlight of Vespasian's reign is his difficulties with Helvidius Priscus, the son-in-law and co-accused of Thrasea Paetus who had been banished from Italy but allowed to return by Galba.[143] This compulsive slanderer fired his first salvo at Vespasian when he proposed that the senate's *legati* to the new emperor be chosen by the magistrates instead of by lot, so as to exclude persons like Eprius Marcellus and give the emperor counsellors of the calibre of those with whom he had associated during his *amicitia* with Thrasea.[144] Marcellus replied that there was no justification for converting an honour to the emperor into an insult to anyone[145] – a reaction to the defamation of himself, but also a reminder that *amicitia hostis* was a treasonable act. Marcellus brought Vespasian's *existimatio* into it even more pointedly when he advised Helvidius not to aim higher than the emperor.[146] Shortly before this, on receipt of Mucianus' letter boasting that the empire had been in his gift and that he had donated it to Vespasian, many senators had reacted unfavourably to a statement that had been considered arrogant towards the *res publica* and insulting to the emperor.[147] The same criticism had, of course, been levelled at C. Silius.

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[142] Dio 63.18.2. Cf. Plin. *Ep.* 1.5.3. It would be going too far, perhaps, to suggest that Nero's execution of the actor Paris as a dangerous rival (Suet. *Ner.* 54) was due to his presumption in calling himself a *histrio*.

[143] Tac. *Ann.* 16.28.2, 33.3; *Hist.* 4.6.1.

[144] Tac. *Hist.* 4.6 f. Eprius Marcellus had been the accuser of Thrasea. He had frustrated Helvidius' attempt to impeach him for that prosecution.

[145] Ib. 4.8: ‚nihil evenisse cur ... principis honor in cuiusquam contumeliam verteretur.'

[146] Ib.: ‚suadere etiam Prisco ne supra principem scanderet.'

[147] Ib. 4.4.

On Vespasian's return from Syria, Helvidius greeted him as ‚Vespasian' instead of by an official title, and as praetor in 70 he deliberately ignored the emperor in his edicts, until the position became so bad that Vespasian felt that he had been reduced to the status of a *privatus*.[148] Eventually the tribunes of the plebs arrested Helvidius and handed him over to their *viatores*[149] (Vitellius had had the same thing done to Helvidius when the latter was praetor designate[150]). Dio obscures this incident by observing that the arrest caused Vespasian to rush out of the senate-house crying that he would be succeeded either by his sons or not at all,[151] but what Dio probably means to convey is that Helvidius had been directing some of his invective at Titus in support of the Stoic contention that only ‚the best man' should rule,[152] and that with charges of *maiestas* in abeyance[153] the only way to cut the tirade short was through the tribunes.

Priscus' continued harassment of the emperor eventually led to his exile, and thereafter to his execution. The exile was *relegatio*,[154] and there is nothing against its having been imposed *lege Cornelia* rather than *lege Julia*.[155] The ultimate execution is less easy. Suetonius says that even when Vespasian ordered Helvidius' death he wanted at all costs to save him and would have succeeded in doing so had it not been for a false report that Helvidius was already dead.[156] What is behind this unexpected attribution of Athenian second thoughts to Vespasian? Suetonius says earlier in the same passage that no innocent person was punished except in Vespasian's absence and without his knowledge or against his will and by misleading him,[157] and although Helvidius was not innocent the most likely explanation of his execution is that it was ordered in Vespasian's name but without his knowledge and that when the emperor found out about it he tried to save Helvidius. The obvious suspect is Titus, and one naturally assumes that he made use of his undoubted talents as a forger[158] in

[148] Suet. *Vesp.* 15.

[149] Dio 66.12.1.

[150] Tac. *Hist.* 2.91.4.

[151] Dio loc. cit. For a different version see Suet. *Vesp.* 25.

[152] Cf. Sherwin-White, 241: ‚The Stoic principle that the „best man" should rule was invoked against Vespasian's determination to found a new dynasty.' The observations about Titus in Suet. *Tit.* 6, 7.1 may reflect Helvidius' invective in support of the ‚best man' doctrine.

[153] Cf. Dio 65.9.1.

[154] Suet. *Vesp.* 15. Cf. Plin. *Ep.* 7.19.4. See also Sherwin-White, 424.

[155] It is true that Vespasian's only reaction to anonymous pamphlets was to put up pamphlets in reply. Dio 66.11.1. But without access to slaves it was not possible to search out the authors. Other forms of defamation could more easily have been prosecuted *lege Cornelia*.

[156] Suet. *Vesp.* 15.

order to mislead Helvidius' executioner. But there is more to it. It was Titus' curious habit, during his tenure of the praetorian prefecture, to send round to the arenas and camps in order to secure a *consensus* on the punishment of those whom he disliked, and then to execute them without delay: ‚praefecturam ... praetori ... egit aliquanto incivilius et violentius, siquidem suspectissimum quemque sibi summissis qui per theatra et castra quasi consensu ad poenam deposcerent, haud cunctanter oppressit.'[159] This technique of the *quasi consensus*, of eliciting popular support for the execution without trial of the manifest wrongdoer, is almost certainly the answer to the case of the manifest wrongdoer Helvidius Priscus. It had been one of the most important means by which previous emperors had managed to do without the *crimen maiestatis*,[160] and it was now being put to good use by Titus – in conjunction, of course, with his ability to forge his father's name.

7. Domitian

With Domitian we return to an active period of the *lex maiestatis*, at least for the latter part of the reign.[161] The keynote is struck by Tacitus at the beginning of *Historiae:* ‚nobilitas, opes, omissi gestique honores pro crimine et ob virtutes certissimum exitium.' In other words, Domitian used charges of *maiestas* to weaken the senate, to enrich the treasury, to punish those who refused office or abused it and to destroy the Stoics.[162] Which is exactly what ought to have been said if Domitian was a despot[163] bent on creating a strong centralised administration in which the senate would have relatively little say.[164]

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[157] Suet. loc. cit.

[158] Suet. *Tit.* 3.2: ‚e pluribus comperi ... imitari chirographa quaecumque vidisset, ac saepe profiteri maximum falsarium esse potuisse.'

[159] Ib. 6.1.

[160] Cf. ch. VII and esp. secs. 3, 4 and ch. VIII sec. 2. For an account of the hellenistic origins of this phenomenon see Colin, pass.; and, for some of its occurrences in the Principate, ib. 109 ff.

[161] Cf. at nn. 202–25 below.

[162] Tac. *Hist.* 1.2, in what is unmistakably a *maiestas* context: ‚corrupti in dominos servi.' The ‚virtuous' are the Stoics forming the subject of our first group of trials (below). Tacitus had called Nero's attack on Thrasea ‚the annihilation of virtue itself'. Tac. *Ann.* 16.21.1.

[163] The rehabilitation of Domitian has not yet assumed the proportions of the Tiberian corpus, but time will no doubt cure that. Gsell's unfavourable verdict is still the dominant trend, witness D. Magie, *Roman Rule in Asia Minor*, Princeton, 1950, 576 ff. (with, however, reservations about the East), although in 1945 Arias had

The leading group of cases of the reign is concerned with the defamatory attacks for which Herennius Senecio, Arulenus Rusticus, the younger Helvidius Priscus and others were brought to book. The sources differ somewhat in their descriptions of the charges,[165] but we have learnt not to expect uniformity even in contemporary accounts. Tacitus says that the death penalty was inflicted on Arulenus and Herennius for praising (or citing) Thrasea Paetus and the elder Helvidius Priscus respectively (‚Aruleno ... Thrasea, Senecioni ... Helvidius laudati essent, capitale fuisse'), and adds that the works of the accused were also destroyed.[166] Pliny says that Senecio was charged with writing a life of Helvidius (‚quod de vita Helvidi libros composuisset') and that Fannia, the daughter of Thrasea Paetus, was also tried – for supplying Senecio with private *commentarii* from her family records, and thus as an instigator[167] – and was sentenced to exile.[168] Suetonius was under the impression that Arulenus (whom he calls ‚Iunius Rusticus') had written the eulogies of both Thrasea and Helvidius and had described them as ‚sanctissimos viros', but he makes amends by being the only source to give details of the offence for which the younger Helvidius

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sketched the lines of a new approach, as indeed Syme, *JRS* 20 (1930), 55 ff. had done, on the specialised question of the finances, even earlier. More recent contributions are listed by H. W. Pleket in his own important paper on the subject, ‚Domitian, the senate and the provinces', *Mnemosyne* 14 (1961), 296 ff. Add K. H. Waters, ‚The character of Domitian', *Phoenix* 18 (1964), 49 ff. See also the comments of Sherwin-White, pass. Syme, *Tacitus* 629 f. reaffirms his earlier view, but is pessimistic, ib. 595 f., about the prospects for an overall reassessment. Any fresh approach will have to take account of Scott's work on the Flavians.

[164] So much is common to Domitian's *inimici* and *amici*. See e. g. Magie, o. c. 576 f.; Pleket, o. c. 299.

[165] This is one of the points seized upon by Rogers, ‚A group of Domitianic treason-trials', *CP* 55 (1960), 19 ff. in support of his contention that these accused were not indicted for the defamatory compositions attested by the sources and ‚must undoubtedly therefore have been charged with treason'. Our reasons for rejecting this abandonment of even a ‚less serious' place in the *lex maiestatis* for *famosi libelli* appear in the text, but it must be said here that Rogers' case is not made any stronger by his assertion, o. c. 21, that ‚the *Histories* of Cremutius Cordus, which Tacitus alleges were the cause of his indictment in 25, are not indicated by Seneca to have been concerned at all in the case'. Seneca himself, *Ad Marc.* 1.3, is the best witness to the invalidity of this statement, and esp. ‚ingenium patris tui, de quo sumptum erat supplicium, in usum hominum reduxisti ... ac restituisti in publica monumenta *libros, quos vir ille fortissimus sanguine suo scripserat*'.

[166] Tac. *Agr.* 2.1.

[167] Cf. ch. II Passage A: ‚dolove malo fecerit, quo quid eorum fieret.'

[168] Plin. *Ep.* 7. 19.5. Fannia received the full penalty under the *lex Julia*. Cf. ‚publicatis bonis'.

was executed – the composition of a stage piece (‚scaenicum exodium') in which Paris and Oenone spoke words capable of being construed as a reflection on Domitian for divorcing his wife[169] (the perennial doctrine of the unnamed victim). Dio has Arulenus killed for being a philosopher and for calling Thrasea holy, and Herennius for standing for no office after the quaestorship and for writing a Life of Helvidius.[170] The discrepancies would not be fatal even under normal circumstances, and they are scarcely peripheral in the unique situation obtaining here, where one of our informants, Tacitus, was one of the judges in the senatorial trials of all three accused[171] and another, Pliny, almost certainly filled a similar rôle.[172] It can safely be accepted that the indictments against Arulenus and Herennius specifically charged *laudes*,[173] and also that mention was made in Arulenus' indictment of his *Vita Thraseae* and in Herennius' of his *Vita Helvidi*. It is also clear that in these two cases the gravamen of the complaint was the composition of works in which remarks derogatory of the Principate or of the emperors as a whole (Thrasea) or of the Divi Vespasian and Titus or even of Domitian as a young man (Helvidius) were scattered in profusion. Furthermore, it is likely that Herennius faced the additional charge of not going beyond the quaestorship, as attested by Dio: there is more than enough precedent for such a charge in the cases of Julius Graecinus and Thrasea Paetus, and further support is forthcoming in the shape of Agricola's dilemma in regard to a second

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[169] Suet. *Dom.* 10.3 f.

[170] Dio 67.13.2.

[171] Tac. *Agr.* 45: ‚mox nostrae duxere Helvidium in carcerem manus; nos Mauricum Rusticumque divisimus, nos innocenti sanguine Senecio perfudit.' On the view taken in the text cf. Sherwin-White, 425. The only difficulty seems to be ‚legimus, cum Aruleno ... capitale fuisse', *Agr.* 2.1, but Tacitus is probably speaking from the point of view of his readers at that juncture.

[172] So Sherwin-White loc. cit., citing Plin. *Ep.* 7.19.6, ‚metu temporum', although it is not clear why the fact that Pliny ‚was in office at the time' should be needed. He had become a senator well before the date (after August 93 – cf. *Agr.* 45, ‚non vidit Agricola') of these trials. On the date of his quaestorship see Sherwin-White, 73 f. It would thus seem that short of deliberate absence Pliny must have been there. And deliberate abstention is unlikely, for Domitian used the *lex maiestatis* almost as a parliamentary whip. Cf. Tac. *Agr.* 45: ‚praecipua sub Domitiano miseriarum pars erat videre et aspici, cum suspiria nostra subscriberentur, cum denotandis tot hominum palloribus sufficeret saevus ille vultus et rubor, quo se contra pudorem muniebat.'

[173] No doubt by the same tenet of accusationary draftsmanship as that which excogitated *amicitia illius*. The charge of *amicitia* never evokes criticism from the sources – nor, of course, does the charge of *laudes*. Such phraseology often opened the door to ambiguity (Bauman, *CM* 144 ff.), but that does not seem to have been resented. It could in fact redound to the advantage of the accused.

governorship;[174] and, of course, Tacitus' ‚omissi honores'[175] foreshadows just such an eventuality. Finally there is Suetonius' ‚sanctissimos viros' – a most interesting feature, provided that he can be persuaded to attribute it to two authors instead of one, or to restrict it to Arulenus' work on Thrasea, as Dio does. Domitian had a monopoly of ‚sanctissimus', ‚sacratissimus', ‚sacratus', ‚sacer', ‚divinus' and ‚caelestis' in respect of his attributes both corporeal and incorporeal,[176] and if Seneca had offended Caligula or the Pythici Nero there was no reason why the present accused should not be held to have offended Domitian.[177]

A case with intriguing possibilities is that of Hermogenes of Taurus who was put to death because of certain *figurae* in his history; the copyists who had duplicated the work were crucified.[178] The *figura*, as Quintilian explains it, is an innuendo,[179] and in the course of his discussion of words of doubtful or double meaning Quintilian gives what may prove to be a striking example: ‚duxi uxorem, quae patri placuit.'[180] Apart from the obvious ambiguity in *placuit*, this may be a case in which *patri* is Quintilian's discreet emendation of a *fratri* in Hermogenes' history, in which event the latter had alluded to the obscure liaison between Titus and Domitian's wife, Domitia, which gave Titus such a bad conscience.[181] Domitian's extreme sensitivity to allusions to his wife's morals is

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[174] Tac. *Agr.* 42, where Agricola, either because he would not be governor of Africa or Asia, or because he dared not, addressed ‚preces excusantis' to the emperor. The debate on this passage between H. W. Traub and K. von Fritz, *CP* 49 (1954), 255 ff., 52 (1957), 73 ff., does not affect the fact that it was not safe to refuse an appointment without permission. On Julius Graecinus see at n. 126 above.

[175] Above.

[176] Gsell, 51 f. and n. 7; Scott, 88 ff. and esp. 99 ff.; Taeger, 346 ff.

[177] Rogers, o. c. (n. 165) makes much of the fact that the sources do not disclose the nature of the charges against those arraigned with Arulenus, Herennius and Helvidius. Even if this were so it would scarcely authorise the conclusion that ‚they must have been charged with treason (in the Rogerian sense)', but in any event it is not correct. The charge against Fannia is fully disclosed by Pliny. Cf. above. In the same passage Pliny has Fannia deny the complicity of her mother, Arria (‚an sciente matre: „nesciente"'), but as Arria was in fact exiled with Fannia (*Ep.* 9.13.5) it is clear that the charge under ‚dolove malo fecerit, quo quid eorum fieret' succeeded against her as well. This leaves Junius Mauricus and Gratilla, brother and wife of Arulenus, with no specifications except the fact of Mauricus' exile (Tac. *Agr.* 45), but that in itself points to defamation rather than ‚treason' as his crime.

[178] Suet. *Dom.* 10.1.

[179] Quint. *Inst. Orat.* 9.2.65. Cf. Arias, 124.

[180] Quint. ib. 9.2.69.

[181] Dio 66.26.4.

shown by his reaction to the younger Helvidius' farce, and also by his execution of Aelius Lamia. Lamia, the former husband of Domitia from whom Domitian had taken her, had delivered himself of some acid remarks – including the apt μὴ καὶ σὺ γαμῆσαι θέλεις; in reply to Titus' exhortation to him to marry again –, but no action had been taken at the time. Much later, however, his words were remembered and used against him.[182] The lapse of time was so long[183] that this must be a case of the slanders having been resuscitated in order to assist in the investigation of some more recent offence of Lamia.[184] It is strange that a remark of Quintilian should once more seem to be very much in point. He is discussing the employment of innuendo when it is not safe to speak openly, and he says that this figure is usually debated in the schools on the basis of a hypothetical abdication by a tyrant or a *senatus consultum* after a civil war making it a capital offence to charge someone with something long since past; thus, adds Quintilian, what is merely frowned upon in the courts is prohibited in the schools.[185] This was not necessarily prompted by the contemporary prosecution of Lamia, but the possibility certainly exists. As Quintilian himself says,[186] the whole point about figures is that they should not be too obvious.

Perhaps the most significant case of the reign is that of the emperor's gladiators. The bare bones of the story, as told by Suetonius,[187] are that a *paterfamilias* complained, in an apparent excess of partisanship, that a Thracian gladiator was a match for the *murmillo* against whom he had been drawn but not for the *munerarius*, by which he meant that Domitian, the giver of the games, was notoriously biassed against the Thracians (in sharp contrast to Titus[188]) and that this militated against a fair fight.[189] The over-enthusiastic spectator was dragged from his seat and thrown to the dogs in the arena, with a notice recording that he was a Thracian supporter who had spoken impiously: ‚detractum spectaculis

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[182] Suet. *Dom.* 10.2.

[183] Domitian had taken Domitia from Lamia in 70. Gsell, 13 f. The second of Lamia's two witticisms was addressed to Titus, and was therefore not later than 81 and in all probability much earlier. Suetonius notices Lamia's case after the cases of Civica Cerealis, Salvidienus Orfitus and Acilius Glabrio. Cerealis perished late in 87. Gsell, 248 and n. 4. Glabrio's death is dated by Xiphilinus to 95. Dio 67.14.3. Suetonius' ‚veteres iocos' with reference to Lamia can mean a lapse of time of anything up to twenty-five years.

[184] Who but a slave could have testified to the conversation that Lamia had had with Titus?

[185] Quint. *Inst. Orat.* 9.2.66 f.

[186] Ib. 9.2.69.

[187] *Dom.* 10.1.

[188] Ib. *Tit.* 8.2.

[189] Cf. Arias, 125 f.

in harenam canibus obiecit cum hoc titulo: „impie locutus parmularius".' A similar incident is referred to by Pliny in his *Panegyric* to Trajan:

> How carefree are the enthusiasms and preferences of spectators! No one is accused of *impietas*, as hitherto, for abusing a gladiator; no spectator becomes a spectacle and pays for his paltry pleasures with fire and hook. The lunatic, knowing nothing of true honour, collected charges of *maiestas* in the arena and considered himself held up to contempt and ridicule if we did not venerate his gladiators as well; he held that abuse of them was abuse of himself and a violation of his *divinitas* and his *numen*, believing himself the equal of the gods and his gladiators the equals of himself.[190]

There are no legal principles in this incident not going back to an earlier period, but what is possibly new is the systematic exploitation of those principles so as, in effect, to bring into being an *ordo gladiatorum* enjoying the same protection against insult as *inlustres*. Strictly speaking the *munerarii* were the quaestors, whose obligation to give games had been revived by Domitian,[191] but this case may have arisen during the special contests in which Domitian's own gladiators frequently appeared, at the end of the programme,[192] and he may thus have been the *ad hoc* producer; or it may simply have been a question of seeing him as the real, although unnamed, victim of an insult ostensibly directed at the *munerarius*. In any event, once the principle had been established the emperor's gladiators became part of the imperial corpus and the centralising tendencies of the regime were given fresh impetus. The unlucky *paterfamilias* was, as a member of the plebs, an obvious choice for the object-lesson, not only because it was essentially a link between emperor and plebs that the games were designed to forge, but also because the desired dramatic impact could best be achieved through the penalties of *bestiis dare* (Suetonius) or *vivus exuri* (Pliny)[193] which had begun, probably since Caligula,[194] to replace *aquae et ignis*

[190] Plin. *Pan.* 33.3 f.: ‚iam quam libera spectantium studia, quam securus favor! nemini impietas, ut solebat, obiecta, quod odisset gladiatorem: nemo ex spectatore spectaculum factus miseras voluptates unco et ignibus expiavit. demens ille verique honoris ignarus, qui crimina maiestatis in harena colligebat ac se despici et contemni, nisi etiam gladiatores eius veneraremur, sibi male dici in illis, suam divinitatem, suum numen violari interpretabatur, cumque se idem quod deos, idem gladiatores quod se putabat.'

[191] Suet. *Dom.* 4.1.

[192] Suet. loc. cit.

[193] The penalty is the one serious discrepancy between the accounts of Suetonius and Pliny. Pliny was of course there, but so could Suetonius have been. But this does not mean that two different incidents are being described, although it is not impossible. One incident is assumed by Scott, 128 and Arias, 125.

[194] Cf. at n. 2 above and ch. IV n. 210.

interdictio as the *maiestas* penalty for *humiliores*.[195] The case was also made to serve other aspects of policy. The wording of the notice, ‚impie locutus parmularius', was carefully chosen: it framed a doctrine of *si qua de Domitiano inreligiose dixisset*, thus lending the massive weight of a conviction for *maiestas* to the attempts to foster a *dominus et deus* appellation for Domitian;[196] and by stressing that the act of impiety was one committed against the reigning emperor by a *parmularius* – a Thracian supporter and thus in effect an adherent of Divus Titus – it advanced Domitian's policy of devaluing his predecessor.[197] (In a strange sort of way Domitian also advanced that policy by deliberately flouting the *lex maiestatis*, when he boasted in the senate that he had conferred *imperium* on both his father and his brother and that they had merely returned it to him.[198] Similar statements about Vespasian had been made by Helvidius Priscus and Mucianus, and would have earned them charges of *maiestas* if that *crimen* had not been in abeyance.)

The case of the *parmularius* has obvious links with similar happenings in previous reigns, notably with the unfortunate *eques* and the equally unfortunate writer of Atellan farces under Caligula[199] and with the ‚tenuioribus statim inrogata supplicia' meted out to inattentive *humiliores* at Nero's performances.[200] Another case of broadly the same type under Domitian is that of the man who omitted at a public sacrifice in Tarentum to cite the emperor as the son of Athene.[201] Cases such as these decisively rule out any suggestion that the *crimen maiestatis* was employed almost exclusively against the disaffected Republican nobility. An instrument of state policy did not differentiate.

As with Nero, so with Domitian there is a crisis concerning the active period of the *lex maiestatis* during the reign. That there was such a period is, of course, beyond all doubt, but that it extended over the whole of the reign is far from certain. Doubt is engendered by Suetonius. He says that the emperor destroyed

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[195] *PS* 5.29.1: ‚his (*sc.* maiestatis damnatis) antea in perpetuum aqua et igni interdicebatur: nunc vero humiliores bestiis obiciuntur vel vivi exuruntur, honestiores capite puniuntur.'

[196] Cf. Suet. *Dom.* 13.1 f. On this difficult appellation see esp. Scott, 88 ff. Cf. Gsell, 51; Taeger, 341 ff., 353 ff.

[197] Cf. ch. IV at nn. 216–19. – The *lex Clodia de iniuriis publicis* of 58 B. C. (Rotondi, 396 f., citing Cic. *Dom.* 81) was apparently concerned with gladiators, but the little that is known of this law does not suggest any interpretation of the incident of Domitian's gladiators other than that given above.

[198] Suet. *Dom.* 13.1.

[199] Cf. at n. 2 above and ch. IV at n. 210.

[200] Tac. *Ann.* 16.5.4.

[201] Philostr. *Apol.* 7.24.

a quantity of libels which had been written and published to the detriment of prominent men and women and inflicted *ignominia* on the authors: ‚scripta famosa vulgoque edita, quibus primores viri ac feminae notabantur, abolevit non sine auctorum ignominia.'[202] The passage is located by Suetonius in Domitian's ‚good' period[203] and is introduced by the emperor's assumption of a perpetual censorship.[204] The crucial question is the meaning of *ignominia* in the passage. If it is a censorial *nota*, we will here be confronted by *censoria potestas* as an alternative to criminal proceedings as a means of suppressing *famosi libelli*, but if it is equivalent to *intestabilis esse* it will point to a remedy *lege Cornelia* rather than *lege Julia*. On either basis, of course, the passage indicates a period in which the *lex maiestatis* was not enlisted against defamatory writings.

There is evidence of a strong and ancient link between the *nota* resulting from a censorial enquiry *de moribus* and the penalty resulting from a criminal trial. It is a question of an overlap between the categories capable of generating the censorial *nota*[205] and the categories capable of generating *iudicia populi*,[206] and a striking illustration is furnished by the case of Mamercus Aemilius in 434 B. C. He had carried a law reducing the term of the censorship to eighteen months and the censors, relying on the familiar-sounding ‚quod magistratum populi Romani minuisset', removed him from his tribe and made him an *aerarius;* but, adds Livy, he bore this *ignominia* with fortitude.[207] A case in which both censorial and judicial remedies are attested is the well-known episode of L. Quinctius Flamininus.[208] In the late Republic the two remedies must have been very close to coalescing, for a *lex Clodia* of 58 B. C. laid down that the censors were neither to exclude from the senate nor impose *ignominia* without first formally accusing the person concerned and condemning him;[209] the law was subsequently repealed, but the notion that the censors should act quasi-judicially survived. In the Principate, Augustus held an enquiry *de moribus* into the abusive remarks of

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[202] Suet. *Dom.* 8.3, where ‚abolevit' does not, *pace* Rolfe, Loeb ed., mean ‚did away with the prevailing publication of scurrilous lampoons'. He destroyed individual publications, not the practice of publishing such effusions. Cf. Tac. *Hist.* 2.48: ‚libellos ... in Vitellium contumeliis insignis abolet.' Suet. *Cal.* 16.1: ‚Titi Labieni ... scripta senatus consultis abolita.'

[203] Cf. n. 216.

[204] Suet. *Dom.* 8.3. Cf. Dio 67.13.1.

[205] On these see Mommsen, *Staatsr* 2.377 ff.

[206] Bauman, *CM* 21 ff. with lit.

[207] Livy 4.24.5–8, on which see R. M. Ogilvie, *A Commentary on Livy*, Oxford, 1965, 573.

[208] Bauman, *CM* 31 f.

[209] Rotondi, 398.

Cassius Severus at the trial of Asprenas Nonius, but did not punish Cassius' *convicium* on that occasion;[210] this was prior to the elevation of verbal injury to treason[211] and was an exercise of Augustus' censorial power.[212] The crucial, and astonishing, case is Claudius. He held the full censorship, not merely the censorial power, and according to Suetonius he placed a *nota* against the name of a man who had been *comes regis* in his province, at the same time citing the charge of *maiestas* preferred against Rabirius Postumus (in 54 B. C.) for following Ptolemy to Alexandria to safeguard a loan: ‚notavit ... quendam vero et quod comes regis in provincia fuisset, referens maiorum temporibus Rabirio Postumo Ptolemaeum Alexandriam crediti servandi causa secuto crimen maiestatis apud iudices motum.'[213] The fact that Rabirius Postumus is here said to have been charged with *maiestas*, rather than *de repetundis* as is generally supposed,[214] need not detain us;[215] what is important is that Claudius cited a public criminal, and *maiestas*, precedent for his proposed censorial notation. The *crimen maiestatis* was being used to maintain the abolition of the *crimen maiestatis*.

The evidence is so clear that it would be pointless to worry about the alternative possibility, namely that *ignominia* might imply *intestabilis esse* and therefore Domitian's use of the *lex Cornelia de iniuriis*. We accordingly conclude that Domitian used his powers as censor to restrain libellous attacks on *inlustres* in the early years of his reign. The question is, however, whether during this ‚good' period (which probably lasted until the revolt of Antonius Saturninus[216])

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[210] Bauman, *CM* 257 ff., except that the writer no longer sees a correlation between the enquiry *de moribus* against Cassius and his trial attested by Tac. *Ann.* 1.72.4.

[211] It was in fact not later than A. D. 5. Bauman, *CM* 258.

[212] On this power of Augustus see esp. H. Siber, *Römisches Verfassungsrecht*, Lahr, 1952, 343.

[213] Suet. *Claud.* 16.2.

[214] Cic. *Rab. Post.* pass. Cf. Rein, 665; Mommsen, Strafr 711 n. 1, 712 nn. 2, 3, 730 n. 3; N. H. Watts, Loeb ed. of *Rab. Post.* 364 f.

[215] Notice should however be taken of Cicero's repeated claim, in his speech on behalf of Rabirius Postumus, that the charge is without precedent, since if a residual claim for the money originally demanded from A. Gabinius was to be brought against Rabirius under the *lex Julia de repetundis*, Rabirius should have been named *in litibus* in Gabinius' case. Cicero goes on to ask several times what law it is that forms the basis of the charge against Rabirius, and asserts categorically, sec. 11, that it cannot be the *lex Julia de repetundis:* ‚qua lege? qua non tenetur.' Cf. sec. 12 i. f. The point was that it was not yet possible to extend the extortion laws to non-officials, an attempt to do so in 55 B. C. having been defeated. Bauman, *CM* 88. Therefore the *crimen maiestatis*, even then a potential omnibus, although within categorical limits, was enlisted.

[216] If there was any great watershed in the reign it was the revolt of Antonius Sa-

the *lex maiestatis* was actually in abeyance or was merely not being used against the defamation category.

The omnibus *maiestas* clause that Suetonius attests for Domitian – ‚satis erat obici qualecumque factum dictumve adversus maiestatem principis'[217] – does not really come into it. Suetonius does not even complicate matters by alleging an act of legislation (‚instituit ut') as he does for Nero; the attestation occurs well after his account of the main treason trials of the reign, and in the context of Domitian's financial straits; and it is plainly a generalisation. But Suetonius raises a slightly more difficult question just before his allusion to the omnibus clause. He says that Domitian took certain men charged with *maiestas* into the senate-house and persuaded the senators to prove their loyalty by condemning the accused to execution *more maiorum;* he then vetoed this penalty on the grounds of its cruelty and asked the senate – Suetonius quotes his exact words – ‚to allow the condemned a free choice of the manner of their death so that all men may know that I was present at the meeting of the senate'.[218] This is almost exactly the situation that Nero had counted on acting out in Antistius' case, except that Nero had apparently intended to remit the death penalty altogether. But it would be hazardous to suggest that Domitian was in fact, like Thrasea Paetus before him, reminding the senate of ‚carnificem et laqueum pridem abolita et esse poenas legibus constitutas' – in other words, that he was proposing the revival of the *lex maiestatis* –, and it may be better to suppose that the incident is connected in some way with the differences between Domitian and the senate on the question of the oath not to put senators to death.[219]

Finally there is the dateable material. With one exception it does not take the matter much further. The excerpts from Dio allocated to 81–89 do not disclose any unmistakable charges of *maiestas;*[220] the executions and exiles ascribed to 83 by Eusebius[221] could have happened in that year, but one would prefer corroboration;[222] and the only solid piece of evidence, the ‚ob detecta scelera

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turninus, dating probably to the end of 88 or the beginning of 89. Cf. Gsell, 197, 216 f., 249 ff.; Arias, 106 ff.; Pleket, o. c. (n. 163) 297 and n. 4; Waters, o. c. (n. 163) 72 f.; Hanslik, *Kl. P.* 1.414. The first great plot, of 87 (Waters, o. c. 72), might be preferred, if it was anything more than the prelude to the Saturninus affair. See also below.

[217] Suet. *Dom.* 12.1.

[218] Ib. 11.2 f.

[219] Cf. ch. VIII at n. 162.

[220] Dio 75.1–10 (9.316–38 Cary). No conclusions can be based on 75.3.3[1], 4[2] (9.322 Cary).

[221] Euseb. 3.17, a. 2099 = 82/83.

[222] Eusebius' account is very similar to and adds nothing to that of Dio (n. 220 i. f.). See also Waters, o. c. 72.

nefariorum' of the *Acta Fratrum Arvalium* for 22 September, 87,[223] gives a date close enough to what would in any event have been the end of the period of abeyance. The possibly cogent information is in Xiphilinus. Under A. D. 93 it is noted that Domitian's acts as censor were important, and one of the examples cited is that of Caecilius Rufinus who was expelled from the senate for acting in mimes.[224] Rufinus is plainly the *quaestorius vir* whose expulsion from the senate ‚quod gesticulandi saltandique studio teneretur' Suetonius notices immediately after the censorial proceedings *de famosis libellis*, so that Xiphilinus is out by a considerable margin when he dates this case to 93. It should be noticed, however, that Xiphilinus then records Dio as having said that he could not be equally approving of what Domitian had done as emperor and as having then turned to the cases of Arulenus Rusticus and Herennius Senecio.[225] It seems clear that Dio saw two distinct phases in the history of verbal injury under Domitian: the censorial phase in the ‚good' period, and the public criminal phase. This is good evidence for a period of abeyance of the *lex maiestatis* in the early years of the reign, and on the whole the case for such a possibility is a not unimpressive one.

8. Pliny and the lex maiestatis

There is reason to believe that Pliny, that vehement and vociferous critic of the *crimen maiestatis*, was responsible for an attempt to bring such a charge in the first year of Nerva's reign, despite the fact that Nerva had specifically abolished charges on his accession.[226] The evidence is provided by Pliny himself, in a letter to Ummidius Quadratus of which the dramatic date is some time in 97. Pliny is describing his attempt to impeach a certain Publicius Certus in the senate for having laid violent hands on the younger Helvidius Priscus during the latter's trial for verbal treason: ‚nullum atrocius videbatur, quam quod in senatu senator senatori, praetorius consulari, reo iudex manus intulisset.'[227] As Pliny goes on to say, he had decided to make an example of Certus and had persuaded Helvidius' widow, together with Arria and Fannia (returned from exile following Nerva's amnesty) to associate themselves with his proposed accusation of Certus: ‚consule illas, an velitis adscribi facto, in quo ego comite non egeo; sed non ita gloriae meae faverim, ut vobis societate eius invideam.' Pliny raised the matter at the

[223] McCrum & Woodhead, p. 29.
[224] Dio 67.13.1 (8.346 Cary).
[225] Ib. 67.13.2.
[226] On the abolition cf. Dio 68.1.2.
[227] Plin. *Ep.* 9.13.2.

first meeting of the senate, without even consulting his friend Corellius Rufus. There was intense opposition when Pliny disclosed his charge (‚ubi coepi crimen attingere') and indicated (without naming him) who the prospective accused was. A friend tried to persuade Pliny to drop the matter, pointing out that he would be a marked man to future emperors. Most speakers defended Certus as if he had already been named and was facing an accepted charge, but Avidius Quietus said that Arria and Fannia should not be denied the right of complaint (‚ius querendi non auferendum'), to which Cornutus Tertullus added that they only wanted to remind the senate of Certus' ‚cruenta adulatio' and to ask that if the penalty for his most manifest crime were remitted he should at least be branded with something equivalent to a censorial *nota:* ‚si poena flagitii manifestissimi remittatur, nota certe quasi censoria inuratur.' Satrius Rufus said that an *iniuria* would be done to Certus if he were not formally acquitted, since his name had been bandied about in the debate and was now known. When Pliny spoke he was received with great attention and applause, culminating in congratulations to him for reviving the long disused practice of bringing matters of public importance before the senate and for rebutting the suspicion that the senate always looked after its own. Nerva did not make a *relatio* concerning Certus to the senate (‚et relationem quidem de eo Caesar ad senatum non remisit'), but Pliny felt that he had won his point, because Certus was not appointed to his anticipated consulship.[228]

The crux of this matter is the nature of the mysterious *crimen*. Why did Pliny name the charge but not the accused? and what charge was it? It has been tentatively suggested by Sherwin-White that Certus' violence ‚might be construed as criminal under the law *ne quis iudicio circumveniretur*',[229] but the guess is not a lucky one.[230] There are four decisive factors here, all of them pointing to a charge of *maiestas*. First, the inclusion of the women as *subscriptores* to Pliny's

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[228] Ib. 9.13.3–23.

[229] Sherwin-White, 492.

[230] Sherwin-White, 96 f. takes this law as providing a remedy against *iudices* and others when a charge of *calumnia* did not lie. The *locus classicus* is *Dig.* 48.8.1 pr.: ‚qui cum magistratus esset publicove iudicio praeesset, operam dedisset, quo quis falsum indicium profiteretur, ut quis innocens conveniretur (circumveniretur: Cujacius) condemnaretur.' Cf. Cic. *Cluent.* 148. See also Mommsen, *Strafr* 633; U. Erwins, *JRS* 50 (1960), 94 ff. Even if one allows the interpretation of a senatorial judge into ‚magistratus ... praeesset', Pliny's ‚manus intulisset' would have to mean ‚did violence to him in a non-physical sense' in order to qualify under the clause in question – which would be to do violence to Pliny. The crux of the matter is the threefold capacity in which Certus is alleged by Pliny to have sinned, on which see below.

accusation[231]: women, although usually denied the right to accuse, possessed it in the case of *maiestas*.[232] Second, the extraordinary lengths to which Pliny went in order to avoid naming the accused: in view of Nerva's abolition of charges, to charge a man with a non-existent crime was highly defamatory, and Pliny wanted to protect himself against the possible failure of his proposal.[233] Third, the proposal of a quasi-censorial *nota* as an alternative to acceptance of the charge: it was essentially as an alternative to the *crimen maiestatis*, not to other *crimina*, that Claudius and Domitian had used the censorial *nota*. And fourth, the fact that Nerva did not make a *relatio:* Pliny was hoping for an indication from the emperor of his willingness to suspend the abolition of charges.

No other explanation fits the facts of this extraordinary case. If it was not a charge of *maiestas* it was either a charge of *calumnia* or a charge under some other public criminal law. But *calumnia* is ruled out by the fact that Pliny's complaint was that Certus had used violence against Helvidius, not that he had been Helvidius' accuser[234] and failed in a charge against him. The prospects are no better for some other *lex:* any other law would have been in full operation and would have required neither Pliny's elaborate precautions nor the emperor's imprimatur – nor would the women have been competent accusers. Pliny's accusation was that Certus had breached his duty as a senator towards a senator, as a *praetorius* towards a consular and as a judge towards an accused, and these were categories of *male gesta re publica* and as such the peculiar preserve of the *crimen maiestatis*.[235]

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[231] Sherwin-White, 493 refuses to believe that Pliny could ‚technically associate the ladies in his accusation, ... because women could not normally act as prosecutors'. Which correctly states the normal rule, but this case was exceptional. See below. Sherwin-White is rightly not happy with his suggestion that ‚perhaps he wanted them as witnesses'.

[232] Mommsen, *Strafr* 369 and n. 6, citing Papinian *Dig.* 48.4.8; Cloud, 227 f. The writer previously (*CM* 218) inferred a right of testation rather than accusation from Papinian's *ratio decidendi*, namely ‚Iulia (Fulvia?) mulier' who gave Cicero information about the Catilinarians, but would now qualify this by saying that at some time between 63 B. C. and A. D. 97 (perhaps in the latter year – Pliny says, *Ep.* 9.13.2, that *exempli ratio* was one of his motives in attempting to indict Certus, although ‚ius querendi non *auferendum*', ib. 9.13.15, may mean an earlier date of origin) women acquired the full right of accusation in *maiestas* cases.

[233] This might help to explain why Pliny's consular friend was so concerned, *Ep.* 9.13. 10, about Pliny's prospects under future emperors. If the *lex maiestatis* were revived Pliny could be brought to book for his present defamatory words.

[234] On the reasons for rejecting the view that Certus had been the accuser see Sherwin-White, 492. Add *Ep.* 9.13.4, ‚non ... invidia, sed proprio crimine urgere'.

[235] On the scope of the *lex Cornelia maiestatis* see Bauman, *CM* 69 ff. and esp. 74 ff., and, on possible earlier precedents, ib. 21 f. See also ib. 87 f.

VII. ADULTERY AND MAIESTAS

1. Tiberius: The evidence of slaves in adultery cases

The tentative link that was forged between the adulteries of the elder Julia and treason in 2 B. C. was repeated in the case of her daughter a few years later,[1] but the attempt to subsume such conduct formally under the *lex maiestatis* at the trial of Appuleia Varilla in A. D. 17 did not succeed.[2] Tiberius' ruling in Appuleia's case was probably the last word on the subject, for there is no case of adultery involving a member of the *domus Caesaris* over the rest of the first century that can be shown to have been dealt with as *maiestas*.[3]

One of the reasons for the cessation of attempts to subsume adultery under *maiestas* is that the peculiar advantage enjoyed by the *crimen maiestatis* in the matter of the evidence of the accused's slaves was extended to the *accusatio adulterii* at a very early stage in the Principate.[4] To be precise, this step was taken in A. D. 20 at the trial of Aemilia Lepida, a case following so closely on the adverse ruling in Appuleia's case that it seems to reflect a deliberate decision to compensate for that ruling.[4a]

The original charge against Aemilia Lepida was *falsum*, in that she had fraudulently sought to foist the paternity of her child on to the wealthy P. Quirinius; there were also allegations of adultery, poisoning and consulting astrologers about the imperial house.[5] Tacitus complains about being unable to

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[1] Bauman, *CM* 198 ff., 233 ff., 240 ff., 242 ff.

[2] Tac. Ann. 2.50.2 and esp. Tiberius' ruling, ‚de adulterio satis caveri lege Iulia visum'.

[3] On the (unsuccessful) attempt to do so in A. D. 20 see below.

[4] The rule went back ultimately to charges of *incestus* in the Republic, but the more specific application to the *lex Julia de adulteriis* came later.

[4a] Evidence such as *Dig.* 40.9.12.1 no doubt seems to indicate an earlier date for the admission of servile evidence in adultery cases, namely 18/17 B. C. when the *lex Julia de adulteriis* was passed. But by no means all the rules ascribed to the *lex Julia* by the late classical jurists originated in that statute as originally enacted by Augustus. See for example Bauman, Q. *Adult.* 82. It is also virtually certain that a general rule admitting servile evidence under the *lex Julia de adulteriis* did not exist at the time of Augustus' edict of A. D. 8 (ch. II at n. 106).

[5] Ib. 3.22.1 f.: ‚Lepida ... defertur simulavisse partum ex P. Quirinio divite atque orbo. adiciebantur adulteria, venena quaesitumque per Chaldaeos in domum Caesaris.' On the charge of *falsum* see Kunkel, *Senat* 48 f.

discern the emperor's true sentiments in this case,[6] and gives the following reasons: Tiberius asked the senate not to receive the charges of *maiestas*,[7] but elicited from the consular M. Servilius and others the very evidence that he had ostensibly wanted to exclude;[8] he transferred Lepida's slaves from military custody to the consuls, and would not allow them to be questioned under torture about matters pertaining ‚ad domum suam';[9] but after an adjournment Lepida's slaves were tortured, her crimes were exposed, and an *aquae et ignis interdictio* was voted, later amended by the deletion of confiscation in deference to Mam. Aemilius Scaurus, by whom she had had a daughter.[10] After the verdict Tiberius disclosed that he had obtained from Quirinius' slaves confirmation of the fact that Lepida had tried to poison Quirinius.[11]

It is clear that the evidence of Lepida's slaves was crucial – it was only when they were examined that her crimes were exposed –, but it is also clear that if the *maiestatis crimina* failed of reception the servile testimony must have been let in on some other ground, and that means adultery. But was the evidence of adultery adduced for its own sake or was it simply an evidential trigger, as verbal injury so often? The evidence favours the latter, and also suggests that the main subject of the enquiry was the charge of poisoning, not only because it was this that Tiberius specially verified by questioning Quirinius' slaves (a separate matter from the interrogation of Lepida's slaves[12]) but also because the penalty of interdiction agrees much better with a conviction *de veneficis* than with one *de adulteriis*.[13] It may be supposed that the original postulation, for *falsum*, was threatened with collapse for lack of evidence, and that in order to bolster up his case the accuser cast round for a way to examine the accused's slaves. *Prima facie* this meant through charges of *maiestas*, and an attempt to proceed by this means was made; when it failed an alternative through the *accusatio adulterii* was allowed, and the resultant *servorum quaestio* produced the necessary proof for a successful charge of poisoning on which the penalty of interdiction was founded.

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[6] Ib. 3.22.3.

[7] Ib. 3.22.4.

[8] Ib.: ‚deprecatus primo senatum ne maiestatis crimina tractarentur, mox ... testes inlexit ad proferenda quae velut reicere voluerat.'

[9] Ib. 3.22.5: ‚servos Lepidae, cum militaria custodia haberentur, transtulit ad consules neque per tormenta interrogari passus est de iis quae ad domum suam pertinerent.'

[10] Ib. 3.23.1–3.

[11] Ib. 3.23.4.

[12] *Dig.* 48.18.1.11: ‚servum mariti in caput uxoris posse torqueri divus Traianus Sernio Quarto rescripsit.' The rule was obviously known before Trajan.

[13] Levy, 2.347 ff., 447; Kunkel, *RE* 24.770; Sherwin-White, 394.

What was the basis of the unsuccessful *maiestatis crimina* in this case? It has been assumed that it was the consultation of astrologers,[14] but that was not *maiestas*. One possibility is that it was first sought to elevate Lepida's adulteries to treason on the grounds that as a former betrothed of Lucius Caesar, Augustus' grandson,[15] she was *Caesari conexa*,[16] and that when this attempt to reverse the ruling in Appuleia's case proved unsuccessful it was urged that the same evidential facilities be allowed on a charge of simple adultery. This might explain a statement inserted by Tacitus between Tiberius' refusal to let Lepida's slaves be examined on matters pertaining to his *domus* and the torture of the slaves. Tacitus says that Tiberius exempted Drusus, then consul designate, from giving his opinion first, and that this was interpreted either as encouraging a free vote or as ensuring a conviction.[17] The reference to a free vote is the important one, indicating as it does that an unfettered decision of the senate was being sought,[18] and on the question of servile evidence in adultery cases. A favourable ruling having been secured, the *servorum quaestio* was held and the poisoning uncovered. It is also likely, in view of the close connection between poisoning and occult practices, that evidence to support the astrological charges was also uncovered by the *servorum quaestio*, and that those charges and the poisoning counts were introduced into the case together, under the *lex Cornelia de sicariis et veneficis*.

The rule allowing the evidence of slaves in adultery cases is prominent in the proceedings against Albucilla and members of her coterie in A. D. 37 (the *impietas in principem* case). Tacitus says in his account of this case that the record of the interrogation of witnesses and the torture of slaves at which Macro had presided was sent to the senate (‚testium interrogationi, tormentis servorum Macronem praesedisse commentarii ad senatum missi ferebant'), but the senate refused to act on this information in the absence of a letter from the emperor.[19] The reference to ‚tormentis servorum' is interesting. Access to the slaves cannot have been gained by virtue of the charges of defamation that Macro was endeavouring to bring against the accused,[20] for a *receptio inter reos* on those charges had not yet been granted by the senate – and was still not granted when

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[14] Furneaux, 1.417; Rogers, *Trials* 52; Koestermann, *TA* 1.457.

[15] Tac. *Ann.* 3.23.1.

[16] Cf. Furneaux, 1.417.

[17] Tac. *Ann.* 3.22.6.

[18] Cf. Nero's insistence on the senate having a free discretion as to the revival of the *lex maiestatis*.

[19] Tac. *Ann.* 6.47.4. Cf. ch. V at n. 141.

[20] Cf. ch. V at nn. 124–39.

the record of the interrogation was made available. The *servorum quaestio* must have been made possible by charges of adultery on which a *receptio* had already been granted.[21] The interrogation had uncovered the proof of the defamatory side of the coterie's activities on which Macro based his charge of *impietas in principem*, so that in this case there seems to have been a reversal of the usual rôles: instead of the defamation category being used to elicit evidence of other crimes, the *accusatio adulterii* was discharging that function – and was doing so on behalf of the defamation category.

2. Caligula

Caligula was not slow to detect the new potential of the *accusatio adulterii*, and put it to good use as a substitute for the *crimen maiestatis* while the latter was in abeyance. The new technique is seen in operation against Macro and his wife, Ennia. Macro may have been guilty of disloyalty,[22] but the charge that brought him down was certainly the *accusatio adulterii*. The particular category alleged against him was probably *lenocinium*, on the somewhat unusual basis that he had procured his wife for Caligula,[23] although it is possible that he was simply charged with committing adultery with his wife, with whom Caligula had purported to enter into a formal contract of betrothal.[24]

The *lex de adulteriis* continued to be put to good use by Caligula even after the reactivation of the *lex maiestatis*. The best-known case is that of the emperor's sisters, Agrippina and Julia Livilla, in A. D. 39. Dio says that Caligula banished them to the Pontian Islands because of their liaison with Aemilius Lepidus, after communicating to the senate many impious and unsavoury facts about them (πολλὰ ... καὶ ἀσεβῆ καὶ ἀσελγῆ).[25] There is no possibility of a hendiadys here, for Suetonius says that they were prostituted by Caligula to his friends and that in the Lepidus affair this enabled him to condemn them both for adultery and for complicity in Lepidus' plots: ‚ut quas saepe exoletis suis

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[21] Cf. Dio's account of the case, 58.27.1 ff.

[22] So Balsdon, 38.

[23] Dio 58.28.4, 59.10.6; Philo *Leg. Gai.* 61; Suet. *Cal.* 26.1, 12.2. On *lenocinium* see Mommsen, *Strafr* 699 ff.; Sherwin-White, 393 f.; Medicus, *Kl. P.* 3.557 f.

[24] Cf. Suet. *Cal.* 12.2: ‚Enniam Naeviam, Macronis uxorem ... sollicitavit ad stuprum, pollicitus et matrimonium suum, si potitus imperio fuisset; deque ea re et iure iurando et chirographo cavit.' Caligula not infrequently used this technique to attack the lawful husbands of his paramours. Cf. Suet. *Cal.* 25.1 f.

[25] Dio 59.22.6, 8. Cf. Suet. *Cal.* 24.3.

prostraverit; quo facilius eas in causa Aemili Lepidi condemnavit quasi adulteras et insidiarum adversus se conscias ei.'[26] ‚Saepe exoletis suis prostraverit' is Dio's πολλὰ ἀσελγῆ and the idea of extending to the *accusatio adulterii* the *agent provocateur* technique that had proved so effective under the *crimen maiestatis* is a credit to the emperor's ingenuity, if nothing else. Macro had instructed his protégé well before he died.

We may imagine that at the outset Caligula had proof of neither conspiracy nor verbal treason against Agrippina and Julia Livilla, and that the *accusatio adulterii* was put to work in the following way: charges based on their adulteries with *exoleti sui* were lodged and accepted; the slaves were interrogated; and the evidence thus revealed made it possible to bring home their conspiratorial liaison with Lepidus.[27] The penalty was almost certainly an *aquae et ignis interdictio*,[28] and this supports the view that the whole purpose of the exercise had been to secure convictions under the conspiracy category of *maiestas*.

3. Claudius: The manifest guilt of Valeria Messalina

Claudius employed the *accusatio adulterii* as a substitute for the *crimen maiestatis* in the first year of his reign, when he relegated Julia Livilla[29] and her co-adulterer, Seneca,[30] but the whole focus of our attention is on the extraordinary case of Claudius' wife, Valeria Messalina, in A. D. 48.

Speaking very generally, Messalina's crime was the contraction of a formal marriage with the consul designate, C. Silius, during the subsistence of her marriage with Claudius but while the latter was absent at Ostia, and for this she and Silius, together with a number of others, were put to death, although only after the imperial freedman, especially Narcissus, had gone to the most extreme lengths to persuade Claudius to act.[31]

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[26] Suet. loc. cit.

[27] On this liaison see Balsdon, 75.

[28] Claudius recalled them from exile and restored their properties (Dio 60.4.1), which means that their sentences had been interdiction and confiscation.

[29] She had been allowed to return on Claudius' accession, Dio loc. cit., but soon got into trouble again.

[30] Dio 60.8.5, 61.10.1; Tac. Ann. 13.42.4, 5. Suetonius alleges a *crimen incertum*, on which see n. 98.

[31] For a good account of the episode as a whole see G. Herzog-Hauser & F. Wotke, ‚Valeria Messalina', *RE* 8 A. 246 ff. See also G. Ferrero, *The Women of the Caesars*, London, 1911, 251 ff.; H. Dessau, *Gesch. d. röm. Kaiserzeit*, Berlin, 1926, 2.165 f.; V. M. Scramuzza, *The Emperor Claudius*, London, 1940, 261 nn. 32, 33; A. Momigliano, *Claudius*,

How are we to characterise the legal proceedings in this case? Some scholars have assumed, not unreasonably, that marrying the emperor's wife was at least as reprehensible as attacking his character or decapitating his statue, and have argued that the crime was treason.[32] But others, no doubt alive to the precarious grounds for such a supposition, have postulated charges under the *lex de adulteriis*.[33] This finding would suit us well enough, since our ultimate purpose is to verify the tradition for Claudius' observance of his abolition of charges of *maiestas* throughout his reign, but the conclusion to which we are impelled by the evidence is that in fact there were no charges at all, whether under the *lex maiestatis*, the *lex de adulteriis* or any other public criminal law. This conclusion will be shown to be quite inescapable in the case of Messalina herself and much more likely than the *accusatio adulterii* – there is in any event no question of the *crimen maiestatis* – in the case of Silius and the rest.

No charges are expressly stated by Tacitus anywhere in his long account,[34] nor are the other sources much more explicit,[35] which is hardly surprising in a case that has Tacitus and Suetonius not only contradicting each other but doubting themselves as well.[36] To Tacitus the gravamen of the offence is the formal marriage, the new amusement to which Messalina turned because she was

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Cambridge, 1961, 76, 120; T. A. Dorey, *Univ. of Birmingham Hist. J.* VIII (1961), 1 ff.; W. Allen, *Numen* IX (1962), 99 ff.; J. P. V. D. Balsdon, *Roman Women*, London, 1962, 97 ff. Cf. the shorter comments of Furneaux, 2.41 ff.; Syme, *Tacitus* 348, 375, 407, 539; Koestermann, *TA* 3.85 ff.

[32] So Rein, 577. Cf., although he is more tentative, Dessau, o. c. 2.166, and (only in his Index) Vittinghoff, 116.

[33] *RE* 8 A. 256 f. Cf. Koestermann, *TA* 3.102; Balsdon, loc. cit.

[34] Tac. *Ann.* 11.26–38 – less commendable than ‚the brevity of Suetonius' according to Syme, *Tacitus* 1.375 n. 4, but an important legal doctrine (see below) might not be accessible without Tacitus.

[35] Suet. *Claud.* 26.2, 29.3, 36, 39.1; Dio 60.31.1–5; Sen. *Apocol.* 11, 13; (Sen.) *Oct.* 257 ff., 265 f., 950 f.; Juvenal 10.329 ff.; Jos. *Ant. Iud.* 20.149. The attack on Claudius in Suet. *Claud.* 36 does not differ essentially from Tac. *Ann.* 11.30.4–31.3.

[36] Tac. *Ann.* 11.25.8, 26.4, 26.7, 30 has Claudius completely unaware of the marriage, but Suet. *Claud.* 29.3 says, although he is not sure if he believes it, that Claudius himself signed the *tabellae dotis* under the impression that it was a fictitious marriage designed to avert a danger which omens portended for him. However, Suet. *Claud.* 26.2 denies that Claudius knew of the marriage or of the dotal contract until after the event. Tac. *Ann.* 11.27 finds it almost incredible that Claudius could have been ignorant of such a notorious matter, but insists that the sources are reliable. Suet. *Claud.* 29.3 is no doubt an attempt to make the impossible merely improbable, and finds some corroboration in the omen attested by Tac. *Ann.* 11.4.3 ff. and in the strong belief in Claudius' susceptibility to deceitful tricks expressed in Suet. *Claud.* 37.2 and Dio 60.14.4, but Suetonius' self-contradiction weakens his case. The other sources support Tacitus, if anyone.

weary of adultery.[37] The marriage was contracted ‚velut suscipiendorum liberorum causa', as he notes in shocked disbelief,[38] but there is not even a specific mention of a charge of adultery,[39] let alone of *maiestas*. It is only when the freedmen begin to see the marriage as a threat to their own positions that matters start taking on a more sinister cast: they realise that where Messalina's adulteries previously brought only humiliation to Claudius, her new venture bodes his destruction.[40] The rest of the account turns on the steps taken by the freedmen to avert such an outcome.

The problem, as the freedmen saw it, was to avoid a trial at which Messalina's fatal power over Claudius might reassert itself, and it was decided to keep on stressing the enormity of her offence, in the hope that the emperor would be induced to condemn her without putting her on trial: ‚ipsa facilitas imperatoris fiduciam dabat, si atrocitate criminis praevaluissent, *posse opprimi damnatam ante quam ream.*'[41]

Narcissus persuaded two of Claudius' concubines to act as informers – ‚delationem subire', significant if technical, since treason was the one crime for which they were, even as women and *famosae*, competent accusers,[42] but in view of the emphasis on Narcissus as the instigator and director of the entire enterprise[43] it is a safe assumption that the concubines were expected to do no more than bell the cat. They informed Claudius of the marriage, Narcissus was sent for, apologised for having kept Claudius in ignorance of Messalina's previous adulteries, and said that even now he neither accused her of adultery nor reclaimed the imperial possessions that she had given to Silius; all that he demanded was cancellation of the marriage, for it was generally known and threatened to make the new husband master of Rome: ‚nec nunc adulteria obiecturum ait, ne domum servitia et ceteros fortunae paratus reposceret. frueretur immo his set redderet uxorem rumperetque tabulas nuptialis. „an discidium" inquit „tuum nosti? nam matrimonium Silii *vidit populus et senatus et miles;* ac ni propere agis, tenet

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[37] Tac. *Ann.* 11.26 f.

[38] Ib. 11.27.1. Cf. Furneaux, 2.40. Suet. *Caes.* 52.3 attributes the same formula to the bill proposing a right of bigamy for Caesar.

[39] There are numerous references to adultery in general (see below), but not to specific *crimina*.

[40] Tac. *Ann.* 11.28.1 Cf. 11.4.2.

[41] Ib. 11.28.3.

[42] Cf. *Dig.* 48.4.8, 7 pr.

[43] Tac. Ann. 11.29.2 f., 30.3, 34.3, 37.1. In view of the sequel, ‚ne quo sermone praesciam criminis et accusatoris faceret' (11.29.2) means neither a formal charge nor an accuser under any public criminal law.

urbem maritus.'"[44] This view of the marriage as an act of usurpation is also implicit in the advice given to Claudius by his *consilium*, to go to the praetorian cohorts and ensure his safety before worrying about revenge.[45] The council's words struck home, and Claudius began to believe that it was indeed a question of his security more than anything else.[46]

Narcissus, temporarily appointed praetorian prefect in the interests of the emperor's security,[47] accompanied Claudius on the journey from Ostia to Rome. When Messalina waylaid them he reminded Claudius of her marriage and distracted his attention by handing him a dossier of her adulteries; and when Vibidia, the senior Vestal, demanded that Messalina be not executed without trial, Narcissus replied that the emperor would give her a hearing.[48] On their arrival in Rome Narcissus took Claudius to Silius' house ('domus adulteri'), pointed out the image of Silius' father, on display in breach of the senate's decree of A. D. 24,[49] drew Claudius' attention to the imperial possessions given to Silius by Messalina, and elicited from the emperor his first positive expression of indignation.[50] They then went to the praetorian camp, Narcissus judging it opportune to do so now that he had at last obtained an indignant (and possibly technical[51]) reaction from Claudius.[52] At the camp they addressed a prearranged mass meeting, Narcissus at some length but Claudius very briefly. The cohorts set up an insistent demand for the names of the wrongdoers and the punishment of their crimes: 'continuus dehinc cohortium clamor nomina reorum et poenas flagitantium.'[53] They did not demand *iudicia* or *crimina*, and we seem to be

[44] Ib. 11.30.4 f.

[45] Ib. 11.31.1 f.

[46] Ib. 11.31.3. Cf. Suet. *Claud.* 36.

[47] It being uncertain whether Lusius Geta, the then incumbent, could be counted on, Narcissus won support for his view that the only hope of safety for the emperor lay in appointing one of the freedmen as prefect, just for the one day, and offered himself as a candidate. Tac. *Ann.* 11.33.1 f.

[48] Ib. 11.34.5: 'Vibidiam depellere nequivit quin multa cum invidia flagitaret ne indefensa coniunx exitio daretur. igitur auditurum principem et fore diluendi criminis facultatem respondit.' If this intervention by Vibidia did take place at this stage, and not later, it is significant that she already had reason to be concerned about the possibility of Messalina's execution without trial.

[49] Cf. ch. V sec. 2, the case of C. Silius. The display of the images was *maiestas* (Bauman, *CM* 47), but this had no bearing on his adultery with Messalina, nor was he called to account for it.

[50] Tac. *Ann.* 11.35.1–3.

[51] 'Incensum et ad minas erumpentem' may imply Claudius' decision to set in motion the process without trial described below. Cf. ch. VIII at n. 153.

[52] Ib. 11.35.3.

[53] Ib. 11.35.3 f.

witnessing one of the episodes that Titus was to imitate during his term as praetorian prefect.

However, a series of what at first sight appear to have been trials followed the cohorts' demand. Silius refused to defend himself and asked for a speedy death, and his example was followed by a number of *inlustres equites Romani.* Also, Titius Proculus and Vettius Valens were sentenced to death as principals and Pompeius Urbicus and Saufeius Trogus as accomplices, while Decrius Calpurnianus, Sulpicius Rufus and Iuncus Vergilianus were punished for degrees of participation not detailed by Tacitus.[54] Mnester the mimist was also brought forward. He pleaded that he had erred under compulsion, having been ordered by Claudius to obey Messalina in all things,[55] and said that he would have been the first to suffer if Silius had become emperor.[56] Claudius was inclined towards leniency, but the freedmen said that an actor should not go free when so many eminent men had been executed, and in any event the crime was of such magnitude that it made no difference whether it had been committed voluntarily or under compulsion.[57] Traulus Montanus, an *eques Romanus,* pleaded that he had been given his congé by Messalina after only one night, but the plea did not succeed.[58] Suillius Caesoninus and Plautius Lateranus were acquitted,[59] the former because he had played a woman's part and the latter because of his uncle's distinguished career.[60]

After his exertions at the camp Claudius went home, had an early dinner, mellowed somewhat, and ordered word to be sent to ‚the poor woman' to appear next day to answer the charges.[61] Thereupon Narcissus, remembering her irresistible attraction for Claudius, told the attendant tribune and centurions that her execution was to proceed, adding that the emperor had so ordered.[62] She was

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[54] Ib. 11.35.4–7.

[55] Cf. Dio 60.22.4 f.: Messalina, being unable to incite Mnester to commit adultery with her, represented to Claudius that she wanted Mnester's obedience in quite another matter, and Mnester was told to do whatever Messalina said. Cf. Tac. *Ann.* 11.36.1: ‚reminisceretur vocis, qua se obnoxium iussis Messalinae dedisset.'

[56] Ib. 11.36.2.

[57] Ib. 11.36.3 and esp. ‚sponte an coactus tam magna peccavisset, nihil referre.

[58] Ib. 11.36.4.

[59] ‚Suillio ... mors remittitur.'

[60] Ib. 11.36.5.

[61] Ib. 11.37.2: ‚domum regressus et tempestivis epulis delenitus, ubi vino incaluit, iri iubet nuntiarique miserae (hoc enim verbo usum ferunt) dicendam ad causam postera die adesset.'

[62] Ib. 11.37.3 and esp. ‚prorumpit Narcissus denuntiatque centurionibus et tribuno, qui aderat, exequi caedem: ita imperatorem iubere'.

executed the same day in the Gardens of Lucullus, and her body was given to her mother for burial.[63] Claudius was informed of her death, but was not told whether she had died by her own hand or the executioner's. He did not ask, and in the days that followed he preserved the same impassivity, even when he saw her children mourning her. The senate helped him to forget by decreeing the removal of her name and statues from all private and public places. Narcissus received the *quaestoria insignia*.[64]

Two attestations in Tacitus' account are crucial: the fact that the marriage was universally known (‚matrimonium Silii vidit populus et senatus et miles'[65]), and the fact that the freedmen had decided to work for Messalina's condemnation without trial by stressing the enormity of her crime, the *atrocitas criminis* (‚si atrocitate criminis praevaluissent, posse opprimi damnatam ante quam ream'[66]). These passages suggest that the freedmen (and the *consilium*[67]) had advised Claudius to avail himself in some way of the doctrine of the manifest wrongdoer. The doctrine is not fully understood,[68] but in broad outline the *manifestus* who is caught in the act and dealt with otherwise than by judicial process is very old, being attested for the thief, the murderer, the adulterer and the armed *hostis* and being justified in at least one instance by a ‚iure caesus' attributed to the XII Tables.[69] The doctrine is also found in offences which had

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[63] Ib. 11.37.4 f., 38.1.

[64] Ib. 11.38.2–5 and esp. ‚iuvit oblivionem eius senatus censendo nomen et effigies privatis ac publicis locis demovendas'.

[65] Cf. at n. 44.

[66] Cf. at n. 41.

[67] Claudius' visit to the camp was urged as strongly by the *consilium* as by Narcissus. It is also possible that the ‚o facinus! o scelus!' of L. Vitellius, supported by C. Caecina Largus (both *amici* of Claudius – Crook, *Consilium* 189, 155), on the journey to Rome (Tac. *Ann.* 11.34.1 f.) was seriously intended to stress the *atrocitas criminis* by which Narcissus set such store, and on which see further below.

[68] The most useful discussions are by A. H. J. Greenidge, *The Legal Procedure of Cicero's Time*, Oxford, 1901, 569 ff.; F. De Visscher, *Études de Droit Romain*, Paris, 1931, 137 ff. (specifically on the *fur manifestus*, but basic to the whole question); and W. Kunkel, *Konsilium* 220 and n. 7, 256, 258 f., 259 n. 2, *Prinzipien* 118 f. The question is ignored by Mommsen, although he has some material, *Strafr* 437 f., on the related question of the *confessus*, and by J. L. Strachan-Davidson, *Problems of the Roman Criminal Law*, Oxford, 1912, except perhaps for passing references at 1.39, 222, 2.34 n. 1, 161 on the *fur nocturnus*.

[69] On the murderer and the thief see Greenidge loc. cit., De Visscher loc. cit. The adulterous wife could, as late as the second century B. C., be killed with impunity if caught in the act (Gell. 10.23.4 f.), and this probably continued until the *lex Julia de adulteriis* confined the right to the woman's father. Cf. Mommsen, *Strafr* 624 f. The principle in Messalina's case is however that of the notoriously guilty who is punished

never attracted a capital sanction.[70] The doctrine did not end with the Republic,[71] for there are numerous examples in the early Principate: ‚coniurationis manifestum',[72] ‚inter damnatos magis quam inter reos habebantur',[73] ‚infamatis magis quam convictis data exilia',[74] ‚reos fuisse se tantum poena experti',[75] ‚manifestum reum',[76] ‚contra manifestos et gravium criminum reos inexorabilis',[77] ‚cur in uxore delicti manifesta ultionem legis omisisset',[78] ‚criminum manifestos merito ad servitutem retrahi'.[79] The most important occurrence of all is in the present case, when Silius urges Messalina to act without delay, pointing out that innocuous plans are for the innocent and that manifest crime has no resource save daring: ‚insontibus innoxia consilia, flagitiis manifestis subsidium ad audacia petendum.'[80] It could no doubt also be argued that Messalina fell under the *confessus pro iudicato est* rule which was closely connected with the *manifestus* rule,[81] since by putting up her children to arouse Claudius' sympathy and sending Vibidia to ask for clemency (the Vestal knew what she was doing when she asked for an assurance of due trial[82]) she was in effect making a plea of *deprecatio*.[83] In any event, the point about both the *manifestus* and the *confessus* is that no *crimen* was required, and that is why the fact that Claudius had not

officially without trial rather than of the *uxor deprehensa* who is killed by the husband, although perhaps the elevation of the penalty to execution rests on the analogy of the marital penalty. The case of the *hostis* was stated by Cato in 63 B. C.: ‚cum ... confessi sint caedem, incendia aliaque se foeda atque crudelia facinora in civis patriamque paravisse, de confessis, sicuti de manufestis rerum capitalium, more maiorum supplicium sumundum.' Sall. *Cat.* 52.36. The XII Tables rule runs as follows: ‚si nox furtum faxsit, si im occisit, iure caesus esto.' Tab. 8.12, *FIRA* 1.57. An important correlation between the manifest crime and *atrocitas* is established by *Dig.* 48.19.16.6: ‚cum factum vel atrocius vel levius est: ut furta manifesta a nec manifestis discerni solent.'

[70] When the *lex Cincia* was revived against pleaders on the motion of C. Silius (the same) in 47, the pleaders felt that ‚non iudicium, quippe in manifestos, sed poenam statui'. Tac. *Ann.* 11.6.5.

[71] Kunkel, *Prinzipien* 118 f. seems to think, but mistakenly, that it did.

[72] Tac. *Ann.* 15.60.3.

[73] Ib. 16.14.5.

[74] Ib. 15.71.6.

[75] Ib. 15.71.11.

[76] Tac. *Hist.* 4.40.

[77] *SHA Vit. Marc.* 24.1.

[78] Tac. *Ann.* 2.85.3.

[79] Ib. 13.26.5.

[80] Ib. 11.26.2.

[81] Cf. Kunkel, *Prinzipien* 118 f.

[82] Cf. at n. 48.

[83] Tac. *Ann.* 11.32.4 f., 34.3 ff.

repudiated Messalina[84] did not affect the position, for that condition precedent to a *crimen* under the *lex de adulteriis*[85] did not come into it when there was no charge.

The above reasoning applies equally if Messalina was attempting ‚to start a revolutionary movement which would rid her of her first husband'[86] rather than committing adultery, for as a manifest or confessed *hostis* she would have been in exactly the same position. It is therefore not necessary to consider the implications of the *abolitio imaginum* voted by the senate after her death, although this typical disability of the *hostis*[87] is somewhat weakened here by the authorisation of burial and mourning,[88] and also by the absence of any senatorial part in the matter prior to the abolition of images.[89]

In the last resort, however, the question is not whether Messalina was an adulteress or a *hostis*, but whether any formal adjudication was pronounced on her at all. Suetonius and Dio say that Claudius put her to death, but not whether it was pursuant to a formal verdict.[90] Tacitus is not sure, and his doubts are shared by Seneca in *Apocolocyntosis*, when Divus Augustus accuses Claudius of having killed Messalina, is told by Claudius that he does not know whether he

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[84] He would have, of course, if Suetonius' evidence (n. 36) were accepted, as it is by Ferrero, o. c. 266 ff. despite Suetonius' own reservations (‚nam illud omnem fidem excesserit, quod nuptiis, quas Messalina cum adultero Silio fecerat, tabellas dotis et ipse consignaverit'). Balsdon, o. c. 106 does not think the ceremony with Silius was a legal marriage at all. Cf. Allen, o. c. (n. 31), for the view that it was part of the wine festival and akin to the *hieros gamos* of Dionysos and Ariadne.

[85] Bauman, *Q. Adult.* 75 n. 59.

[86] Momigliano, *Claudius* 120, apparently adopting Ferrero's remarkable theory, o. c. 268 ff., that Messalina, fearing Claudius' assassination and her own consequent murder, decided to forestall this by destroying Claudius herself and appointing and marrying his successor. We do not deny the gravity of the threat (cf. Crook, *Consilium* 41), but only that the public criminal procedure was enlisted against it.

[87] Vittinghoff, 12 ff.

[88] The question of *abolitio imaginum* and the denial of burial to and mourning for the *capite damnatus* is in some disarray. Mommsen held, *Staatsr* 3.1190 f., that a special *s. c.* was always required, but subsequently he maintained, *Strafr* 987 ff., that it took place *ipso iure* and was avoidable only by an act of clemency. Vittinghoff, 12 f., 15, 43 and n. 198, 46 and nn. 210, 211 also fluctuates. Mayer-Maly, *Kl. P.* 1.1374 cites Vittinghoff but does not say whether he agrees with him. Fortunately our problem is simplified by the fact that Messalina was probably not *damnata*. See below.

[89] Cf. Dessau, o. c. (n. 31) 2.166: ‚Nachträglich legalisierte der Senat das Verfahren ... durch Ächtung ihres Andenkens.' We would not, however, agree that the procedure by which she was executed needed ‚legalising'. See below.

[90] Suet. *Claud.* 26.2; Dio 60.31.5.

killed her, and remarks that not to know is worse than to have done it.[91] This occurs in the context of Divus Augustus' proposal of an *aquae et ignis interdictio* against Claudius under the *lex Cornelia de sicariis* for executing various people, including Messalina, without trial.[92] Furthermore, in what is clearly a reference to those whom Tacitus portrays as having been dealt with at the praetorian camp,[93] *Apocolocyntosis* says that they were executed on the orders of Narcissus: ‚quos Narcissus duci iusserat.'[94] And Juvenal observes that Claudius obeyed Narcissus' orders even to the extent of executing Messalina at his bidding.[95]

No one except Tacitus alleges that Narcissus falsely represented to the tribune and centurions that the execution of Messalina had been ordered by Claudius, but is that in fact what Tacitus alleges? He attests two things which *prima facie* contradict each other, namely Claudius' directive for ‚the poor woman' to appear next day for trial and Narcissus' ‚ita imperatorem iubere', but is it not possible that both are true, that Claudius, either because he was intoxicated or stunned[96] or simply because the agile Narcissus was too much for him, both authorised the trial and ordered the execution? Suetonius knows of another very similar incident. A centurion reported that he had carried out an order for the execution of a consular, whereupon Claudius denied having given any such order; but he approved of the act when his freedmen told him that the soldiers had done their duty in taking it upon themselves to avenge their commander.[97]

Messalina's case is perfectly consistent with the strong tradition for executions without trial under Claudius. Thus, Julia Livilla (subsequent to her relegation for adultery with Seneca) and the other Julia, daughter of Drusus, were executed on unspecified charges and without being given an opportunity to defend themselves: ‚Iulias, alteram Drusi, alteram Germanici filiam, crimine incerto nec defensione ulla data occidit.'[98] There is a similar complaint about Drusus' daughter in *Octavia:* ‚Iulia ... post longa tamen tempora ferro caesa est, quamvis crimine nullo.'[99] Here ‚post longa tempora' suggests that the *crimine nullo* procedure had been used because the five years' period of extinctive prescription

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[91] *Apocol.* 11.

[92] Ib. 11, 14.

[93] Except that Tacitus omits two or three of the names listed in *Apocolocyntosis.*

[94] *Apocol.* 13.

[95] Juv. 10.329 ff.

[96] He is intoxicated in Tac. *Ann.* 11.37.2 when he says that she is to be warned to appear next day, and the whole tenor of the account is focussed on his state of shock. Cf. Suet. *Claud.* 29.1 on his general reputation for second thoughts.

[97] Suet. *Claud.* 29.2.

[98] Ib. 29.1.

[99] *Oct.* 944 ff.

under the *lex Julia de adulteriis*[100] had elapsed, and this is important. Augustus had been criticised for circumventing the same rule by giving the adulteries of his daughter the title of *laesarum religionum ac violatae maiestatis*,[101] but with the *lex maiestatis* in abeyance under Claudius some other form of circumvention had to be used.[102]

That Messalina was not tried under either the *lex maiestatis* or the *lex de adulteriis* is beyond all reasonable doubt. But what of the proceedings at the praetorian camp? Must these be interpreted as trials proper, seeing that the only confrontation that Narcissus wanted to forestall was between the emperor and Messalina? *Apocolocyntosis* discusses those who were dealt with at the camp quite separately from Messalina and other victims of the *crimine nullo* procedure,[103] its only criticism of the proceedings at the camp being ‚quos Narcissus duci iusserat'; [104] but this is not enough, for the crisp question is whether Claudius adjudicated on *crimina* or punished extra-judicially. There is cogent evidence in favour of the latter. The cohorts' demand for ‚nomina reorum et poenas' but not for *iudicia* or *crimina* indicates some sort of popular mandate to proceed with the sentencing of those whose guilt was manifest, and the individual cases point either to a similar conclusion or to the cognate *confessus* doctrine. Silius admitted his guilt, as did the *inlustres equites Romani*. Titius Proculus' tender of evidence against others[105] was an admission of his own complicity; and Vettius Valens confessed.[106] Mnester pleaded either *purgatio* or *remotio criminis*,[107] and Traulus

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[100] On this period of prescription see Bauman, Q. *Adult.* 82.

[101] Bauman, *CM* 204 f.

[102] There are numerous other examples of Claudius' *crimine nullo* technique. E. g. Suet. *Claud.* 29.1; *Apocol.* 11. See also ch. VIII sec. 2, where the concept is further discussed in detail. There are obvious similarities between this procedure and another Claudian measure which the sources dislike, namely the introduction of civil judgments by default against contumacious defendants. Suet. *Claud.* 15.2: ‚absentibus secundum praesentes facillime dabat, nullo dilectu culpane quis an aliqua necessitate cessasset.' Cf. Dio 60.28.6. It is tempting to see the rules concerning *manifesti* and *confessi* as having been formalised by Claudius – they of course originated much earlier – at the same time as the default judgment rule and other procedural changes by Claudius (on which see J. Stroux, *Eine Gerichtsreform d. Kaisers Claudius*, Munich, 1929), but the similarities may be accidental.

[103] *Apocol.* 13, 11.

[104] Possibly an attack on Narcissus' exercise of authority as praetorian prefect.

[105] Tac. *Ann.* 11.35.6.

[106] Ib.

[107] Cf. *Ad Herenn.* 1.24 f.: ‚purgatio est cum consulto negat se reus fecisse. ea dividitur in inprudentiam, fortunam, necessitatem.' ‚in hominem transfertur (*sc.* culpa), ut si accusetur ... et id iussu consulum defendat.'

Montanus *deprecatio*.[108] The acquittals of Suillius Caesoninus and Plautius Lateranus were successful invocations of the plea that failed to save Montanus (Suillius' woman's part still made him a *socius criminis*), and it is not without significance that Tacitus describes these acquittals as ‚mors remittitur'[109]: so far were the proceedings from the *lex maiestatis* that it was either the death penalty or nothing. It is not, of course, necessary to infer charges under any public criminal law from the fact that Pompeius Urbicus and Saufeius Trogus were ‚ex consciis',[110] but if any inference is drawn it should postulate *lenocinium*[111] rather than *maiestas*. It is worth noting that Titius Proculus' tender of evidence did not save him: as a rule such offers were favourably received,[112] but no further evidence was needed if the guilt of the accused did not have to be proved. Finally there is the time factor. Claudius had a busy day. On his return from Ostia he went to Silius' house and from there to the camp, disposed of at least fourteen defendants,[113] returned home and was still in time for an early dinner; and after this – still in the daylight hours[114] – the drama of Messalina was played out. This requires a brevity of procedure at the camp not easily reconcilable with the time required for fourteen contested cases.[115]

The only evidence against summary proceedings at the camp is Dio's assertion that Narcissus' disclosure of Messalina's intention to kill Claudius and elevate Silius persuaded the emperor to arrest and torture certain persons (τινας).[116] Tacitus, of course, does not speak of a plot to kill Claudius, since to him Silius' elevation is a natural consequence of the bigamous marriage, and although he has many of the participants in the wine festival arrested,[117] he does not have

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[108] Cf. ib. 1.24: ‚deprecatio est cum et peccasse se et consulto fecisse reus confitetur, et tamen postulet ut sui misereantur.'

[109] Tac. *Ann.* 11.36.5.

[110] Ib. 11.35.6. *Conscius* is often a treason accomplice. Cic. *Phil.* 2.17; Val. Max. 6.7.2; Tac. *Hist.* 1.26, 3.13; Tac. *Ann.* 4.45.3, 11.22.2, 15.57.4, 15.59.2; Suet. *Dom.* 10.5. But it is equally often an accomplice in some other crime. *Ad Herenn.* 2.4.7; Cic. *Rosc. Am.* 68; Livy 42.17.6; Ps.-Quint. *Decl.* 11.3; *Dig.* 48.9.6. It can also refer to a private law undertaking, *Dig.* 10.2.22 pr., 42.8.10.2, or to a non-forensic undertaking, Tac. *Germ.* 10, *Ann.* 1.5.1, Suet. *Tib.* 22. Urbicus and Trogus were the *leno* aimed at by *Dig.* 48.5.2.2 ff.

[111] N. 110 i. f.

[112] Tac. *Ann.* 6.3.5, 6.7.5, 6.9.6.

[113] Ib. 11.35 f.; *Apocol.* 15.

[114] Cf. ‚propinqua nox', Tac. *Ann.* 11.37.3.

[115] On the possible length of a criminal trial see Bauman, Q. *Adult.* 79 f.

[116] Dio 60.31.5.

[117] Tac. *Ann.* 11.32.3. On the possible significance of the wine festival in this matter see Allen, o. c. (n. 31). The festival does not, however, have any bearing on the legal

them examined under torture. But even if Dio is taken at face value he does not in any way require the supposition that there were charges of *maiestas*. The interrogation under torture to which he alludes was of free witnesses arrested at the wine festival, and that particular form of painful questioning was available under any *crimen*[118] and even, in terms of an innovation by Claudius,[119] when there was no *crimen* at all. And even if the interrogation of slaves against their masters was part of the proceedings referred to by Dio it is still not necessary to postulate charges of *maiestas*, for the *accusatio adulterii* was quite capable of attending to that aspect. On balance, however, the case for no *crimina* at all is much more persuasive than any of the possibilities based on charges.

4. Nero: Octavia and the people's rage

The proceedings against Nero's former wife, Octavia, in A. D. 62 (after the revival of the *lex maiestatis*, it so happens) may be a further illustration of the *crimine nullo* technique. An attempt to base a charge on Octavia's alleged adultery with the slave Eucaerus having failed,[120] it was decided to elicit a confession from someone who could also be plausibly charged with conspiracy: ‚ergo confessionem alicuius quaeri placuit cui rerum quoque novarum crimen adfingeretur.'[121] Anicetus, the *praefectus classi* at Misenum, was prevailed upon to volunteer for this task. Tacitus says that it was made clear to him that only a confession of adultery was wanted,[122] but that when he appeared before Nero's *consilium* he included in his fictitious confession much more than he had been told to do[123] – which means either that he described his relations with Octavia with embellishments or that he gilded the lily with an imaginary plot. In favour of the latter is the fact that Nero's edict making known the content of his con-

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issues unless there is a suggestion of occult practices on the analogy of the Bacchanalian affair. But the sources do not bring such an aspect into the criminal proceedings here.

[118] Mommsen, *Strafr* 406 postulates a general rule permitting the torture of free witnesses rather than a rule confined to *maiestas*, and the evidence cited by him (or intended to be cited – Mommsen's citations are not secure in this matter) supports his view. See Suet. *Tib.* 58, 62.1; Dio 57.19.2, 60.15.6; Tac. *Ann.* 11.22.1 f., 15.56.1 f.; Suet. *Dom.* 8.4; *CTh* 9.19.1; *CJ* 9.41.11, 9.41.3, 9.41.10, 9.41.8.

[119] Cf. ch. VIII at nn. 59–66.

[120] Tac. *Ann.* 14.60.3–62.1.

[121] Ib. 14.62.2.

[122] Ib. 14.62.5: ‚nec manu aut telo opus: fateretur Octaviae adulterium.' The murder of Agrippina was not to be repeated.

[123] Ib. 14.62.6: ‚plura etiam quam iussum erat fingit fateturque.'

fession[124] stated that Octavia had seduced Anicetus in the hope of winning over the fleet. But the sentences do not indicate charges of treason. Anicetus was exiled (‚pellitur') to Sardinia and Octavia (‚claudit') to Pandateria, and the fact that Anicetus spent a ‚non inops exilium' suggests that there was no confiscation in his case. Octavia was killed on Pandateria,[125] but whether on fresh charges or *crimine nullo* is not made clear by Tacitus. The thanksgiving voted after her death[126] may mean her involvement in a genuine plot after the Anicetus case, although Tacitus says that she died within a few days of her banishment;[127] furthermore, when he condemns the thanksgiving as a travesty[128] he presumably implies that no new factor had intervened.

Suetonius' version is that Nero relegated Octavia during the popular demonstrations in her favour after the divorce[129] and subsequently put her to death on a charge of adultery based on the false confession of Anicetus, after those who had been questioned under torture[130] had denied her guilt.[131] When this anti-Neronian account attests a specific *crimen adulteriorum* it obviously commands respect, but it is evident that the matter was contentious in the first century, judging by a passage in the *Octavia*. Nero declares Octavia a *hostis*, is challenged to justify such a declaration against a woman, explains that the test is whether she has committed crimes, is asked who accuses her, and replies that the people's rage is the accuser: ‚Cur meam damnas fidem?/ Quod parcis hosti./ Femina hoc nomen capit?/ Si scelera cepit./ Estne qui sontem arguat?/ Populi furor.'[132] Nero then orders her banishment, and execution on arrival at the place of exile, in one and the same breath[133] – which cannot be dismissed as dramatic compression in view of its close agreement with Tacitus. The important part is that *populi furor* is the only accuser, since this raises the same elusive suggestion of *Volksjustiz* as we have seen with Titus and Claudius. *Populi furor* presupposes that Octavia was summarily punished as a *manifesta*, and in fact this is confirmed by Nero's observation that the penalty will crush a criminal who has been transgressing

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[124] Koestermann, *TA* 4.152.

[125] Tac. *Ann.* 14.62.6, 63.1, 64.2 ff.

[126] Ib. 14.64.4.

[127] Ib. 14.64.2: ‚paucis dehinc interiectis diebus mori iubetur.'

[128] Ib. 14.64.4 f.

[129] Tac. *Ann.* 14.60.3 ff. has a different sequence: the failure of the attempt to incriminate Octavia and Eucaerus; Nero's repudiation of Octavia; her relegation to Campania; popular demonstrations; and her recall.

[130] Octavia's *ancillae* in Tac. *Ann.* 14.60.4.

[131] Suet. *Ner.* 35.2.

[132] *Oct.* 863 ff.

[133] Ib. 874 f.: ‚devectam rate procul in remotum litus interimi iube.'

for a long time[134] – again the circumvention of the extinctive prescription of the adultery law in the case of the manifest wrongdoer.[135]

5. Domitian

The tradition for Domitian's use of the adultery laws is most peculiar, not so much because of his unfortunate habit of prosecuting women whom he had seduced[136] – if it was during the dormancy of the *lex maiestatis* it is explicable as a window on conspiracy, and ample precedent had been provided by Caligula – as because of the sheer incredibility of a tradition which insists that one and the same man divorced his wife for adultery with the actor Paris, after having with difficulty been dissuaded from putting her to death; executed Paris; made his niece, Julia, his mistress; took his wife back, ostensibly because the people demanded it, but continued his liaison with Julia; reacted with the utmost severity to the adulteries of Vestals; expanded or intensified the provisions of the *lex Julia de adulteriis;* and struck the name of an *eques Romanus* from the album of *iudices* because he had taken his wife back after divorcing her and charging her with adultery.[137] In the case of the adulterous empress there is perhaps a slight suggestion that *populi furor* was capable of subsiding and being replaced by *populi venia*, and if Dio's assertion that Domitian killed Paris ‚in the middle of the street'[138] did not strike its author as nonsensical it may be because this was yet another case in which the people had pronounced on the guilt of a manifest wrongdoer, but for the rest Domitian's policy in matters of morality is not easy to comprehend.

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[134] Ib. 872 f.: ‚poena quae iam sera damnatam premet diu nocentem.'

[135] Zonaras 11.12 p. 477, 11 ff. attests (false) charges of adultery and wizardry against Octavia. The γοητεία is the ‚wizardry' inherent in the administration of drugs to procure an abortion. It is not clear how Furneaux, 2.311 and Koestermann, 4.152 conclude that abortion is shown by Cic. *Cluent.* 31 not to have been a crime in Roman law. The *lex Cornelia de sicariis et veneficis* was in operation (Cluentius was charged under it), apart from which Cicero says that the capital condemnation of the Milesian who aborted herself by drugs was ‚nec iniuria'. There is no reason to think that the rescript of Severus in *Dig.* 47.11.4 is the earliest legislation on the subject. The *senatus consulta* in *Dig.* 48.8.2 f. will be older than the Severan rescript, and if read with *PS* 5.23.14 yield the exact case with which we are here concerned.

[136] Dio 67.12.1.

[137] Suet. *Dom.* 3.1, 8.3 f.; Dio 67.3.1 f.; Juv. 2.29–33, 36 f.; Mart. *Ep.* 2, 4, 7, 22, 45, 91. See also L. Friedlaender, *D. Junii Juvenalis Saturarum Libri V*, Leipzig, 1895, 1.167 f.

[138] Dio 67.3.1.

VIII. THE ABOLITION OF CHARGES OF MAIESTAS

1. ‚A rose by any other name'

The curious institution of name-changing has an important bearing on the abolition of charges of *maiestas*. The earliest instance is in Tacitus' account of Otho's reign. The emperor, wishing to restore certain ex-senators to the status which they had forfeited on being condemned *de repetundis* under Claudius and Nero,[1] accomplished his purpose by changing the name of the charges on which they had been condemned, so that what had been extortion became *maiestas:* ‚placuit ignoscentibus verso nomine, quod avaritia fuerat, videri maiestatem.'[2] Tacitus' comment is that at that time even good laws succumbed to the odium of *maiestas* (‚cuius tum odio etiam bonae leges peribant'), and this has been taken to mean that the setting aside of convictions for *maiestas* was assured of public approval and was thus an apt way of granting an amnesty.[3] This is certainly one of the conclusions authorised by the passage, but ‚cuius ... peribant' also obscures a remarkable piece of sleight of hand: the *lex maiestatis* was in abeyance under Otho,[4] and therefore when the name of the charges was changed to *maiestas* the ex-senators were seen to stand condemned for a non-existent crime and were automatically restored to their former status. A presumptive situation of this sort need occasion no surprise in a people able to tolerate two systems of law, to say nothing of the countless legal fictions embedded in the Edict, with no apparent sign of discomfort.

The ingenuity of Otho was equalled by that of Marcus. According to Dio's

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[1] They included Cadius Rufus, condemned *de repetundis* in 49. Tac. *Ann.* 12.22.4. Expulsion from the senate followed immediately on condemnation by that body. Bleicken, 42.

[2] Tac. *Hist.* 1.77.

[3] H. Heubner, *P. Cornelius Tacitus: Die Historien*, Heidelberg, 1963, 1.161.

[4] An abolition by Otho is not directly attested, but his determined attempts at conciliation (Suet. *Oth.* 7.1, Dio 64.8 [Cary 8.208]) arguably culminate in sufficient proof of abolition in Plutarch *Oth.* 1.2, where πολλὰ ... φιλάνθρωπα διαλεχθείς probably means a general amnesty (cf. Waldstein, 34 ff.), in which case it also implies an abolition. Cf. below. See also Plut. *Oth.* 1.3, and esp. 3.1, where Otho excises private grievances from his memory in a manner reminiscent of Claudius in Dio 60.3.7.

epitomiser,[5] the emperor took no action against senators who had been implicated with Avidius Cassius; instead of bringing them before his own court, he simply fixed a date for their trial and sent them for trial by the senate, *as if they were being charged with some other crime* (ὡς καὶ ἄλλο τι ἐγκαλουμένους). The account goes on to record that in respect of non-senators the emperor condemned a few who had committed actual crimes, either in collaboration with Cassius or on their own, including Flavius Calvisius, prefect of Egypt, who was relegated to an island without confiscation of his property; and even then Marcus burnt the record of the case, to avoid having it used as a ground of criticism against him.[6] To Tertullian the crime of Avidius Cassius was *impietas* (= *maiestas*),[7] and this was the designation that had to be avoided in the senatorial trials, the reason being that Marcus had abolished charges of *maiestas;*[8] he did not quite keep to his abolition, because for some reason the forbidden charge went on record in the proceedings brought against Flavius Calvisius in the emperor's court,[9] but as far as trials in the senate were concerned he anticipated ‚Maecenas' by referring conspiracies to the senate under one or other of the public criminal laws (other than the *lex maiestatis*).

Another example of flexible nomenclature is the strange phenomenon of the mass punishment of delators at the beginning of a new reign. The *locus classicus* is Pliny's description of what appears to have been a mass trial of delators in the amphitheatre at the start of Trajan's reign, the outcome of which was the wholesale deportation of the defendants in specially chartered ships, and confiscation of their properties.[10] What charges were preferred against the delators in such cases? The obvious answer is *calumnia*, but there are difficulties. *Calumnia* was the institution of a public criminal charge which was, and which was known by the institutor to be, without foundation, and it was usually dealt with by the

[5] Dio 71.28.2 (Cary 9.48).

[6] Ib. 71.28.3. According to *SHA Vit. Av. Cass.* 8.8 a few centurions were punished, which is a curious echo of what Suetonius says about Claudius' abolition. Cf. below.

[7] Cf. ch. I at n. 32.

[8] Below at n. 173.

[9] There is no other explanation for the destruction of the records in the case. There is no trace of any renunciation by Marcus of jurisdiction over non-senators, and even if there had been, the burning of the records would not have concealed, and could not have been expected to conceal, the fact that there had been an exercise of such jurisdiction.

[10] Plin. *Pan.* 34–5, an extraordinary passage. The proceedings to which it refers are introduced as a ‚quam pulchrum spectaculum' put on by Trajan in contrast to the odious spectacle of the over-zealous Thracian supporter under Domitian. For the sources for the trials of delators as a whole see Mommsen, *Strafr* 496 n. 2 (in line 2 for ‚Neros' read ‚Nervas'). Add Tac. *Hist.* 2.10; SHA *Vit. Pii* 7.2.

court which had acquitted the accused and immediately after such acquittal.[11] But here the delators' victims had been condemned, and several years before, and by tribunals other than the Roman people in amphitheatre assembled. A similar problem had faced Galba, and his solution had been a decree of the senate *ut accusatorum causae noscerentur* under which condemnations had been reviewed by what was virtually a process of retrial,[12] but this was a limited – and, even at the time, unsatisfactory[13] – remedy, and clearly not suited to mass production. The need for something more manageable had been felt by both Titus and Nerva,[14] but in Pliny's opinion the ultimate solution had had to await the ingenuity of Trajan.[15] Pliny does not give any further details of the new technique, but in view of the strong inclination, even in 69, to treat such cases as manifest guilt[16] it is a safe guess that Trajan, having abolished charges of

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[11] Mommsen, *Strafr* 491 ff.; A. H. J. Greenidge, *The Legal Procedure of Cicero's Time*, Oxford, 1901, 468 ff.

[12] Tac. *Hist.* 2.10: Annius Faustus, an *eques* who had practised as a delator under Nero, was summoned for trial before the senate under the Galban *senatus consultum*. Ib. 4.10, 40: Publius Celer, ‚a quo Baream Soranum falso testimonio circumventum (accusator) arguebat' – clearly a virtual retrial – was condemned.

[13] Ib. 2.10: ‚id senatus consultum varie iactatum et, prout potens vel inops reus inciderat, infirmum aut validum, retinebat adhuc aliquid terroris.'

[14] For Titus, Suet. *Tit.* 8.5 has ‚delatores mandatoresque' scourged in the Forum, led across the arena, and then either sold into (or in continuation of: ‚subici ac venire') slavery or deported to islands. It would seem that under Nerva the procedure was by way of accusation. Thus Dio 68.1.2 f.: many informers were put to death, everyone was accusing everyone else, and the consul Fronto said that if anything was worse than an emperor under whom no one was allowed to do anything, it was one under whom everyone was allowed to do everything.

[15] Plin. *Pan.* 35.4 f. and esp. ‚divus Titus securitati nostrae ultionique prospexerat ...: sed quanto tu quandoque dignior caelo, qui tot res illis adiecisti, propter quas illum deum fecimus! Id hoc magis arduum fuit quod imperator Nerva ... perquam magna quaedam edicto Titi adstruxerat nihilque reliquisse nisi tibi videbatur, qui tam multa excogitasti, ut si ante te nihil esset inventum.'

[16] Vibius Crispus, the accuser of Annius Faustus, had persuaded a large part of the senate ‚ut indefensum et inauditum dedi ad exitium postularent'; but the majority was against this and ‚dari tempus, edi crimina, quamvis invisum ac nocentem more tamen audiendum censebant'. Tac. *Hist.* 2.10. Demetrius the Cynic was frowned upon ‚quod manifestum reum (*sc.* Publium Celerem) ... defendisset'. Ib. 4.40. The sequel to Celer's case was the senate's (unsuccessful) approach to Domitian ‚ut commentariorum principalium potestatem senatui faceret' so as to enable the names of informers to be discovered, followed by the interesting technique of making the informers *manifesti* by requiring all magistrates and other senators to take an oath ‚nihil ope sua factum quo cuiusquam salus laederetur, neque se praemium aut honorem ex calamitate civium cepisse'. Ib. 4.40 f.

maiestas, devised a modified version of Otho's *verso nomine* procedure whereby all the unpopular charges of Domitian's reign were deemed to have been *maiestas*, with the result that the victims were seen to have been condemned for a non-existent crime and the guilt of the delators was so manifest that *populi furor* was all that was needed for their condemnation.

2. Claudius

Claudius is the text-book case on the abolition of charges, being credited by Dio[17] with having honoured his abolition throughout his reign, and in case we have any misgivings about Dio there are two passages in Tacitus to support him. The first is the ‚tum primum revocata ea lex' which introduces the case of Antistius Sosianus,[18] a statement that should be taken to imply a continuous period of abeyance since the original abolition by Claudius, for there is no trace of a fresh act of abolition by Nero: if there had been Tacitus would have included it in his account of Nero's delineation of ‚formam futuri principatus'.[19] The other passage in Tacitus concerns the attempt that was made to prosecute L. Vitellius in A. D. 51. A *postulatio* was lodged by Junius Lupus, a senator, alleging *maiestas* and aspirations to empire: ‚is crimina maiestatis et cupidinem imperii obiectabat.'[20] Claudius was inclined to entertain the charges, but was dissuaded by Agrippina, and the accuser was sentenced to interdiction,[21] presumably for his calumnious attempt to prosecute for a non-existent crime: he had no doubt been led to believe that a rescript from Claudius on the lines of Nero's subsequent rescript in Antistius' case would be forthcoming, but this was frustrated by Agrippina. A close call, but in the result the abolition stands.[22]

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[17] Dio 60.3.5–4.2, set out in full at ch. I n. 27.

[18] Cf. ch. VI sec. 4.

[19] Cf. Tac. *Ann.* 13.3 f. and esp. 13.4.2, ‚discretam domum et rem publicam' – arguably a restatement of the Claudian abolition if abolitions had applied only to a special segment, but not once they applied to the *maiestas* statutes as a whole.

[20] Ib. 12.42.4 f.

[21] ‚Praebuisset auris Caesar, nisi Agrippinae minis magis quam precibus mutatus esset ut accusatori aqua atque igni interdiceret.'

[22] If Tacitus had been just a little more specific about the ‚crimina maiestatis et cupidinem imperii' alleged against L. Vitellius our problem would fall away. If this phrase is a hendiadys the abolition applied to the *maiestas* statutes as a whole; if not, it applied to a special segment. It is probable that Vitellius had done something that endangered Claudius (or was thought by him to do so) rather than merely assailed his dignity, for that is the pattern emerging most clearly from the cases to be discussed below, and therefore a hendiadys is almost certain.

Dio and Tacitus are not enough, however, for there is a great deal of suspicious evidence to be disposed of before Claudius' unbroken record can be regarded as secure. With Messalina and the others out of the way, our enquiry focusses on the conspiracy category. Conspiracies undoubtedly occurred during the reign, and were suppressed, and the question is whether suppression was achieved by charges of *maiestas* or by some other means – either by the *crimine nullo* procedure or by charges under some public criminal law other than the *lex maiestatis*.

It is possible that Claudius first invoked the *crimine nullo* procedure in connection with the execution of Chaerea and others implicated in the murder of Caligula. The defendants were brought before Claudius and his *consilium* and were, in the current view of scholars,[23] given due and proper trial and were found guilty and sentenced to death. But the evidence needs reconsidering. According to Josephus the reason for punishing them was that although the deed was excellent it was disloyal (meaning that it was a breach of the oath of allegiance[24]), and should be punished as a deterrent.[25] Dio, speaking just before his account of the amnesty and the abolition of charges, says that they were put to death for having dared to kill an emperor, although in fact Claudius was more worried about his own security and acted as if he had caught them plotting against himself; by contrast, adds Dio, those who had been actively associated with what had been done during the attempted restoration of the Republic received honours and immunity.[26] Suetonius, who seems to think that Chaerea and the others were executed subsequently to the amnesty and in breach of it,[27] says that they were punished as an example and also because they had demanded the murder of Claudius himself.[28]

Claudius' problem was a delicate one – to dissociate himself from the tyrant but without approving of tyrannicide.[29] In such circumstances it might well have been better to avoid framing a charge at all, and here a suggestion thrown out by Kunkel should, despite its author's rejection of it, be given serious consideration. Kunkel points out that Chaerea made not the slightest attempt to deny his guilt, and in fact gloried in it, and is therefore the typical *confessus* or *mani-*

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[23] Cf. Kunkel, *Konsilium* 259 ff.

[24] Ib. 261.

[25] Jos. *Ant. Iud.* 19.268 ff.

[26] Dio 60.3.4 f.

[27] ‚Veniam et oblivionem in perpetuum sanxit ac praestitit, tribunis modo ... interemptis.'

[28] Suet. *Claud.* 11.1.

[29] Timpe, 92.

festus; but in Kunkel's view summary justice is excluded by the fact that Claudius referred the matter to a vote of the *consilium.*[30] There are, however, grounds for thinking that this case is in fact an example of the *crimine nullo* procedure. This possibility proceeds from a suggestion in Josephus of a popular verdict in advance of the meeting of the *consilium:* the people met in the Forum, where they usually held their formal assemblies (ἐκκλησιάζειν), in order to investigate the murder of Gaius, and they went about their task with great energy, in contrast to the perfunctory investigation by the senate; Valerius Asiaticus, the consular who was presiding over the assembly, finding the people insistent in their demand to be told the names of the murderers (cf. ‚nomina reorum flagitantium'), replied that he wished it had been he.[31] Josephus may be wrong about its having been a formal assembly – a *contio* is more likely –, but the general outline is clear and is strikingly reminiscent of the Messalina affair. There, too, the *consilium* was convened (at the camp) *after* the green light had been given by the cohorts, and in neither case did it meet to decide whether the accused had committed the act in question. That issue was either admitted or manifest, and the question before the *consilium* was simply the exculpatory plea – the duress exerted on Mnester or the praiseworthy motives of Chaerea, for example. Such issues did not require *crimina* to be framed, and thus Claudius was, in Chaerea's case, relieved of the invidious task of alleging formally that the murder of Caligula had diminished the *maiestas* of the Roman people.[32]

The execution of Appius Junius Silanus in A. D. 42 involved the use of the *crimine nullo* procedure against someone who was in fact not a *manifestus,* but who was deemed to be such by a piece of almost non-Aristotelian logic. Messalina and Narcissus, wishing to destroy Silanus but not being able to frame a viable charge,[33] invented a dream in which Silanus killed Claudius. Word was

[30] Kunkel, *Konsilium* 258 f.; cf. 260.

[31] Jos. *Ant. Iud.* 19.158 f.

[32] It is argued by Cloud, 217 that *laesa maiestas* ‚occurred in a law of Caesarian or Augustan origin' and was ‚standard towards the end of the principate of Tiberius'. It was, however, certainly not of Caesarian origin (Bauman, *CM* 157 ff.) and very doubtfully of Augustan in view of ‚minuisses maiestatem imperii nostri', Sen. *Contr.* 9.2.9 Müller – a passage that also weakens the case for a standard Tiberian practice. Cf. also ‚se violari et imminui quereretur', ch. VI n. 60. In any event Cloud loc. cit. concedes the possibility of a gloss on *minuerit* in the fragment of Marcian, *Dig.* 48.4.3, on which *laeserit* depends. The same fragment has the incorrect *maiestas publica* instead of *maiestas p. R.*

[33] Dio 60.14.3 says that he refused to have intercourse with Messalina, and thus incurred the enmity of Narcissus. This would be more incredible if we did not have the uses to which Caligula and Domitian put the adultery law. Dio's motive is however absent from Suet. *Claud.* 29.1, 37.2. On the lack of a viable charge see Dio 60.14.4.

sent to Silanus to attend at Claudius' *salutatio*, but when he arrived a report was put about that he was trying to force his way in. The dream having been thus manifestly ‚corroborated', Claudius ordered Silanus to be forthwith summoned and put to death: ‚quasi plane repraesentaretur somnii fides, arcessi statim ac mori iussus est.' The next day Claudius reported what had been done to the senate (as he was to do in Messalina's case).[34] If Suetonius is to be believed, the precedent for this was the civil litigant who told Claudius at a *salutatio* of a dream in which someone had murdered Claudius, and shortly afterwards pointed out his opponent in the suit as the guilty party, whereupon the latter was hurried off to execution as if caught in the act: ‚confestim is pro deprenso ad poenam raptus est.'[35]

The crucial case is the great conspiracy of L. Arruntius Camillus Scribonianus, legate of Dalmatia, and L. Annius Vinicianus in 42. The only extant account of the proceedings is in Dio.[36] He says that after the collapse of the conspiracy and the suicide of Scribonianus, Claudius investigated those who had joined in plotting against him and put many to death, including a praetor who had abdicated and was then executed. Some committed suicide, including Vinicianus. Messalina and the freedmen stopped at nothing, using slaves and freedmen as informers against their masters and subjecting members of all classes to torture, despite Claudius' oath at the beginning of his reign not to torture any free man. Some of the most guilty saved themselves by the favour or venality of Messalina and the freedmen, and the sons of those who perished were given immunity,[37] and in some cases money as well. The trials were held in the senate, in the presence of the emperor, the praetorian prefects and the freedmen. Galaesus, a freedman of Scribonianus, was remembered for his outspokenness before the

[34] Suet. *Claud.* 37.2. Cf. Dio 60.14.4, 15.1. If, as D. McAlindon, *AJP* 77 (1956), 117 f. believes, Silanus was guilty of ‚actual conspiracy', the roundabout procedure becomes doubly significant here: manifest guilt was contrived because of the non-availability of the *crimen maiestatis*.

[35] Ib. *Claud.* 37.1. These cases are set against the background of Claudius' inordinate fear of conspiracies, 36, 37.1: ‚nulla adeo suspicio, nullus auctor tam levis exstitit, a quo non mediocri scrupulo iniecto ad cavendum ulciscendumque compelleretur.'

[36] Dio 60.15.1–16.8. Suet. *Claud.* 13.1, 13.2, 35.2 sees the episode as ‚civile bellum' but says nothing about the forensic aspects. In *Epit. de Caes.* 4.4 Scribonianus is ‚imperator creatus'. Tacitus has *Ann.* 12.52.2, ‚Camillus arma per Dalmatiam moverat;' *Hist.* 1.89, ‚Scriboniani contra Claudium incepta' (contrasted in the passage with the ‚pacis adversa' of Tiberius and Caligula); *Hist.* 2.75. See also Plin. *Ep.* 3.16, esp. 3.16.7 ff.

[37] Cf. Tac. *Ann.* 12.52.1 f. on Scribonianus' son. He was spared, although ‚stirps hostilis', but in 52 he was exiled – a lenient sentence, in Claudius' view – for astrological enquiries about the emperor.

senate, and Arria achieved immortality by showing her husband, Caecina Paetus, how to die.[38]

Dio has placed some formidable obstacles in the way of his own attestation of an unbroken abolition, but some of them are easily disposed of. The torture of free men was not peculiar to *maiestas*,[39] and it is pertinent to note that Suetonius attributes its employment by Claudius to the latter's general bloodthirstiness and links it with the similar satisfaction that Claudius derived from witnessing the execution of parricides: ‚saevum et sanguinarium natura fuisse, magnis minimisque apparuit rebus. tormenta quaestionum poenasque parricidarum repraesentabat exigebatque coram.'[40] It may not be a coincidence that *parricidium* was Marcus' choice as the ‚other charge' on which the Cassian conspirators were tried by the senate.[41] Other easily explicable features of the Scribonianus trials are *memoriae damnatio* (if it was inflicted on any of the condemned at all[42]), which will merely have foreshadowed the *abolitio imaginum* that Messalina was to sustain without any vestige of a trial; and the treatment of the sons of the condemned, which contrasts significantly and helpfully with the severity shown to the children of Sejanus and of those who had rebelled against Nero.[43]

There are some glaring anomalies in Dio's account, not least the fact that it comes within very much less than a memory-span of his assertion that the abolition was honoured throughout the reign. The story about droves of women being led to the scaffold like prisoners of war and then cast out on the Gemonian Steps[44] does not agree with Tacitus' assertion that Vibia, wife of Scribonianus and a front-row culprit, was merely sentenced to *relegatio*,[45] nor with Dio's own statement that Arria could easily have saved herself by appealing to Messalina,[46] and raises the suspicion that the aftermath of the fall of Sejanus had become a regular part of Dio's repertoire.[47] The assertion that Galaesus and

[38] On Arria see Sherwin-White, 248 f.

[39] Cf. ch. VII at n. 118.

[40] Suet. *Claud.* 34.1.

[41] Below at nn. 179–89.

[42] On the doubtful position here see Vittinghoff, 38 f.

[43] Dio 58.11.5; Tac. *Ann.* 5.8.1, 9. On the Neronian case see McAlindon, o. c. (n. 34) 116. See also Suet. *Ner.* 36.2.

[44] Dio 60.16.1.

[45] Tac. *Ann.* 12.52.1. On the controversy about her name see Syme, *Hermes* 92 (1964), 415 n. 2 and Koestermann, *TA* 3.197.

[46] Dio 60.16.6.

[47] Cf. ib. 58.15.2 f. with 60.15.6, 16.1. If Dio could be relied on here, the women ascending the scaffold ‚like prisoners of war' might suggest the very sort of unforensic *Kriegsrecht* situation that we need.

Arria were admired because ‚the long succession of woes had made a noble death the only virtue'[48] is an insult to the intelligence: how had ‚the long succession of woes' arisen in this, the second year of the reign? The praetor who abdicated and was executed[49] is also suspicious: Tacitus and Suetonius know of the abdication and suicide of L. Silanus in 48,[50] but not of a similar incident in 42.[51]

The crux of the matter is, of course, the proceedings in the senate attested by Dio,[52] for even if most of his shafts went astray he might have hit the mark here. In fact, however, his luck is still out. There is no objection to his assertion that the praetorian prefects and the freedmen were present and that Narcissus took an active part in the proceedings, for Claudius had the right to take a praetorian prefect and military tribunes into the senate with him[53] and Narcissus could have been an accuser,[54] but it is scarcely encouraging to be told that Claudius read the *relatio* while sitting *either* between the consuls *or* on the tribunes' bench. The statement is a generalisation, as it is in Suetonius in a context having nothing to do with trials,[55] and that is precisely why Dio goes on to say that ‚the same procedure was followed on other important occasions'.[56] Quite a different forum for the trials is suggested by Pliny's account of an encounter between Arria and Vibia at Claudius' house. Vibia was giving evi-

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[48] Dio 60.16.7.

[49] Dio 60.15.4.

[50] Tac. *Ann.* 12.4.5, 8.1; Suet. *Claud.* 29.2.

[51] Dio goes to extraordinary lengths in his determination to make Scribonianus' case a receptacle for every piece of stray information about Claudius. He says at the end of his account that Claudius was so intent on punishing the persons concerned that he kept on giving the soldiers as a watchword the verse about having ‚to defend oneself against anyone who picks a quarrel with one' (τὸ ὅτι χρὴ „ἄνδρα ἀπαμύνασθαι ὅτε τις πρότερος χαλεπήνῃ"). Dio 60.16.7. By this deliberate amputation Dio conceals the fact that in the Homeric original (*Il.* 24.368 f., *Od.* 16.71 f., 21.132 f.) the speaker complains about being too weak to protect himself against anyone who picks a quarrel with him. Which is precisely the complaint that Suetonius has Claudius make to the senate (prior to the conspiracy of Scribonianus): ‚senatum ... convocavit lacrimisque et vociferatione miseratus est condicionem suam, cui nihil tuti usquam esset.' Suet. *Claud.* 36. Cf., on the chronology, 13.1 f.

[52] Dio 60.16.3.

[53] Suet. *Claud.* 12.1.

[54] Dio 60.16.5.

[55] Suet. *Claud.* 23.2.

[56] The proceedings in the senate are also displaced in Dio 60.16.3. We have already had Claudius putting many to death, the evidence of slaves and freedmen being admitted, free witnesses being tortured, many being executed, women ascending the scaffold, the most guilty saving themselves by bribes, the sons of the condemned being shown leniency – and then suddenly the trials in the senate.

dence against the conspirators, and Arria said that she would not listen to a woman who had seen her husband murdered in her arms and dared to outlive him: ‚eadem apud Claudium uxori Scriboniani, cum illa profiteretur indicium, „ego," inquit, „te audiam, cuius in gremio Scribonianus occisus est, et vivis?".'[57] This part of the proceedings, at any rate, was held *intra cubiculum*[58] and not in the senate.

In the last resort, however, the fact that there were trials is more important than where they were held, and if charges of *maiestas* are to be ruled out as their basis there has to be an explanation for Dio's last throw of the dice, namely his assertion that slaves were used as informers against their masters. Assuming that this is Dio's one lucky guess, how is it to be reconciled with ‚some other charge' than *maiestas* (or than adultery, of which there is no suggestion here)? Fortunately help comes from a most unexpected quarter. Trajan, about whose abolition and its observance there is no doubt, was responsible, as De La Berge noted with sorrow,[59] for some extraordinary legislation on the subject of evidence under torture. The most relevant is his rescript laying down that where a slave who is accused of complicity in his master's crime, and who is put to the question in his capacity as an accused, happens to incriminate his master, the court has a discretion to admit the evidence against the master: ‚si servi quasi sceleris participes in se torqueantur deque domino aliquid fuerint confessi apud iudicem: prout causa exegerit, ita pronuntiare eum debere divus Traianus rescripsit.'[60] Ulpian expresses his dislike of this rule and says that it was subsequently repealed,[61] but he notes some intricate footwork by Hadrian to a very similar effect without objection: ‚divus Hadrianus Calpurnio Celeriano in haec verba rescripsit: „Agricola Pompei Valentis servus de se potest interrogari. si, dum quaestio habetur, amplius dixerit, rei fuerit indicium, non interrogationis culpa."'[62] There was also a rescript of Trajan allowing the husband's slave to testify *in caput uxoris*[63] (but this went back to Tiberius[64]), and another laying down that the slaves of a *damnatus*, having ceased to belong to him, could testify against him.[65] (Who was Tacitus really aiming at when he criticised Tiberius

[57] Plin. *Ep.* 3.16.9.

[58] Cf. Sherwin-White, 249.

[59] C. De La Berge, *Essai sur le règne de Trajan*, Paris, 1877, 137 f.

[60] *Dig.* 48.18.1.19.

[61] Ib.: ‚quo rescripto ostenditur gravari dominos confessione servorum. sed ab hoc rescripto recessum constitutiones posteriores ostendunt.'

[62] Ib. 48.18.1.22.

[63] Ib. 48.18.1.11.

[64] Cf. ch. VII at n. 12.

[65] *Dig.* 48.18.1.12.

for his sales to the *actor publicus*?) The whittling down of the exclusionary rule so as to let in servile testimony even where the charge was not *maiestas* or adultery need not have originated with Trajan (it was his practice to condemn controversial legislation and then to re-enact it[66]), and it is a fair assumption that the prototype was supplied by Claudius. There is thus nothing against the view that in so far as *crimina* were framed against the Scribonianus defendants, they were charges of *parricidium*.[67]

There is further evidence to be sifted on the question of whether Claudius ever made use of the *lex maiestatis*. Suetonius traces three phases in Claudius' experience of treachery: attacks by individuals (an *e plebe homo* and two *equites*); a conspiracy (Asinius Gallus and Statilius Corvinus); and a civil war (Scribonianus).[68] The first phase is not capable of elucidation,[69] but on the second Dio offers the exile of Gallus in 46 for plotting against Claudius, and explains the moderate sentence by the fact that Gallus had neither raised an army nor collected money and was a small and ugly man not likely to attract support.[70] Which does not seem to make him a conspirator at all. This leaves L. Silanus, T. Statilius Taurus and P. Valerius Asiaticus, not noticed by Suetonius (except, briefly, Silanus[71]) but elsewhere alleged with varying degrees of cogency to have conspired against Claudius.[72] The only charge of conspiracy against Silanus is that preferred by Dio, but he is not dogmatic about it.[73] Tacitus has Silanus charged with incest with his sister, Junia Calvina: he was forced to resign his praetorship and committed suicide, she was expelled from Italy and purificatory rites were performed.[74] Tacitus doubts the validity of the charge and ridicules the purificatory rites,[75] but does not suggest any other charge. Statilius Taurus is a straightforward case. Proconsul of Africa, he was accused by his legate, Tarquitius Priscus, of *repetundae* and *magicae superstit-*

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[66] Plin. *Pan.* 46.2 f.

[67] Cf. at nn. 179–89 below.

[68] Suet. *Claud.* 13.1.

[69] The *equites* will not include the Cn. Nonius of Tac. *Ann.* 11.22.1. He was caught ‚in coetu salutantum principem', whereas in Suetonius they proposed attacking him ‚egressum theatro' and ‚sacrificantem apud Martis aedem'.

[70] Dio 60.27.5.

[71] Suet. *Claud.* 24.3, 27.2, 29.1 f.

[72] See McAlindon, o. c. (n. 34) 116 f. Cf. Scramuzza, o. c. (ch. VII n. 31) 93 ff.

[73] Dio 60.31.8, where the meaning can well be that the allegation of plotting was made to Claudius in order to persuade him to take action, not that it was formally charged.

[74] Tac. *Ann.* 12.4, 8.1 f. Cf. Sen. *Apocol.* 8, 10.

[75] Tac. *Ann.* 12.4.1 f., 8.2. Cf. *Octavia* 149.

iones and committed suicide before the senate's verdict; the accuser was expelled from the senate for disloyalty to a superior.[76]

The complex case is that of Valerius Asiaticus. The background in Tacitus is Messalina's anxiety to acquire Asiaticus' *horti* and to use him as an understudy to ruin Poppaea Sabina without involving Mnester.[77] The accuser, P. Suillius and his subscriber, Sosibus used the familiar technique of terrifying Claudius. He was warned that Asiaticus had publicly admitted his complicity in Caligula's murder and had gloried in it;[78] to his renown in Rome he proposed adding renown abroad by visiting the German armies, a fact generally known in the provinces; and with his connections at Vienna he would easily arouse the tribes.[79] Two bases for summary justice were thus laid before Claudius: *confessus* (in respect of the one crime – the murder of Caligula – not covered by the amnesty) and *manifestus* (at least as persuasively as in the case of the dream about Silanus). Claudius reacted with unusual energy, sending the praetorians ‚tamquam opprimendo bello' to arrest Asiaticus. Trial by the senate was denied and the case was heard *intra cubiculum,* with Messalina present. Suillius relied on three counts: *corruptio militum,* in that by bribery and homosexuality the accused had inducted soldiers into a life of crime; adultery with Poppaea; and effeminacy.[80] Thus Tacitus. Dio also notices the case. He says that certain persons were plotting against Claudius but that the emperor made light of the accusations with the exception of that against Asiaticus. The latter denied knowing any of the prosecution witnesses, and scored heavily when a soldier who was asked to identify him pointed out another baldheaded man. Claudius was about to acquit Asiaticus when L. Vitellius, acting in the interests of Messalina, said that Asiaticus had asked to be allowed to choose the manner of his death. Claudius interpreted this as a confession, and condemned him.[81] Tacitus, we may note, has Claudius consult Vitellius about a verdict of absolution, whereupon Vitellius evades the issue by enumerating the accused's merits and urging a free choice of death, which Claudius concedes.[82] Asiaticus committed suicide. This is clearly

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[76] Tac. *Ann.* 12.59.

[77] Ib. 11.1.1.

[78] ‚Non extimuisse contione in populi Romani fateri gloriamque facinoris ultro petere.' Which is, except for the *contio,* exactly what Josephus says. N. 31.

[79] Tac. *Ann.* 11.1.2.

[80] Ib. 11.1.3–2.1.

[81] Dio 60.29.4–6a (8.2 ff. Cary).

[82] Tac. Ann. 11.3.1: ‚sed consultanti super absolutione Asiatici flens Vitellius, commemorata vetustate amicitiae utque Antoniam principis matrem pariter observavissent, dein percursis Asiatici in rem publicam officiis recentique adversus Britanniam militia, quaeque alia conciliandae misericordiae videbantur, liberum mortis arbitrium ei permisit;

yet another in the series of contrived confessions and manifestations, and the same can be said of the sequel, when the senate was convened to try two *equites inlustres* by the name of Petra. They were executed, says Tacitus, for having lent their house for the assignations of Mnester and Poppaea, but the ostensible charge against one of them was a dream in which he had seen Claudius wearing a wheaten crown with inverted ears, which he had interpreted as portending a shortage of grain; according to some reports, however, he had seen a vine-wreath with withered leaves which he had taken as an omen of the emperor's death in the autumn.[83]

The *crimine nullo* procedure is, predictably, attested for *iniuriae* to the emperor. Suetonius says that a *scriba quaestorius* and a senator of praetorian status were relegated without being heard, although innocent, the former for having been rude to Claudius as a *privatus* during a suit and the latter for having as aedile fined Claudius' *inquilini* for market offences and whipped his *vilicus*.[84] One presumes that the relegations were carried out under Claudius' *imperium*. What is surprising, however, is the absence of any trace of *renuntiatio amicitiae* in the reign. It seems that as long as his security was not threatened Claudius was quite genuinely not interested in either the *crimen maiestatis* or substitutes for it.

There was an awkward moment in 51, a year after Claudius' adoption of Nero, when Britannicus greeted Nero as ‚Domitius'. This disregard of the fact that L. Domitius Ahenobarbus was now Ti. Claudius Nero Caesar sent Agrippina post-haste to Claudius to complain that the adoption was being spurned and the *senatus consultum* and *lex* by which it had been authorised abrogated, that all this was being done in the emperor's house, and that unless those responsible for inculcating these wicked ideas were removed there would be a public disaster: ‚quod ut discordiae initium Agrippina multo questu ad maritum defert: sperni quippe adoptionem, quaeque censuerint patres, iusserit populus, intra penatis abrogari; ac nisi pravitas tam infensa docentium arceatur, eruptura in publicam perniciem.'[85] This is *maiestas* language, and it is only Tacitus' very careful choice of words that saves the situation: ‚commotus *his quasi criminibus*

et secuta sunt Claudii verba in eandem clementiam.' Tacitus correctly has Claudius consult his *consilium* on absolution. Cf. Kunkel, *Konsilium* 258 f. There is an improvement on the dream technique here. Asiaticus becomes a *confessus* or a *manifestus* not because he himself asks for a free choice of death (in fact he rejected the concession: ‚remittere beneficium Asiaticus ait', 11.3.2), but because Vitellius, speaking as if he were defence counsel, recommends it.

[83] Tac. *Ann.* 11.4.1–5.

[84] Suet. *Claud.* 38.2.

[85] Tac. *Ann.* 12.41.6 f.

optimum quemque educatorem filii exilio aut morte adficit.'[86] Why ‚*quasi* criminibus'? The meaning usually proposed is ‚implied' or ‚hinted',[87] but this will not do. The freedmen charged with Britannicus' education[88] felt that the matter had progressed somewhat further than hints when they found themselves facing death or exile. A better meaning for *quasi* is on the analogy of *obligationes quae quasi ex delicto nascuntur*[89]: *maiestas* being in abeyance, the act complained of could not generate *crimina* proper, but only *quasi crimina*. This case may also be directly connected with the attempt to revive the *crimen maiestatis* against L. Vitellius. Tacitus refers to that attempt almost at the same time as Britannicus' case, and says that Agrippina dissuaded Claudius from accepting the charges against Vitellius more by threats than entreaty (‚minis magis quam precibus').[90] Tacitus does not explain what the threats were, but it is not impossible that Agrippina confronted Claudius with the reminder that if he revived charges one of the first to be accused would be Britannicus.

3. Caligula

Caligula's abolition of charges is alluded to by Dio twice, in 59.4.3 and in 59.6.2 f. The terminology is almost the same in both places: τὰ τῆς ἀσεβείας ἐγκλήματα παύσας (κατέλυσε). In the first (preview) passage, the emperor abolished charges but destroyed very many on such charges, and although he claimed to have forgiven the enemies of his father, mother and brothers and to have burnt their letters, he only destroyed copies and put many to death because of those letters. In the second account, he freed some prisoners, including Q. Pomponius who had been in prison for seven years, abolished charges of *asebeia* which he saw as the main reason for the prisoners' plight, and burnt or pretended to burn the documents left by Tiberius pertaining to them, declaring that he did so in order not to bear anyone a grudge on account of his mother or brothers. (Despite the reference to Q. Pomponius, the main backlog from the previous reign was the series of *impietas in principem* charges against Albucilla's friends,[91]

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[86] Ib. 12.41.8.

[87] *Lex. Tac.* s. v. *quasi;* Furneaux, 2.112; M. Grant, *Tacitus* 261.

[88] Tac. *Ann.* 12.41.5. Cf. Dio 60.32.5, where Agrippina is said to have killed Sosibius, the man charged with Britannicus' education, on the pretext that he was plotting against Nero.

[89] *Inst.* 4.5. Cf. Dig. 44.7.5.4 f., *quasi ex maleficio.*

[90] Tac. *Ann.* 12.42.5.

[91] Cf. ch. V at nn. 122–47.

and it is strange that Caligula's first act should have meant the cancellation of a project by which Macro had set such store.)

Suetonius has a very good account. Caligula recalls *damnatos relegatosque;* remits all *crimina* remaining over from the previous reign; has all *commentarii* pertaining to the cases of his mother and brothers taken to the Forum, takes public oath that he has not read them, and has them burnt, in order that no delator or witness should have any further fear; and refuses a *receptio inter reos* on a *libellus de salute sua,* declaring that he has given no one any reason to hate him and has no ears for informers:

> Damnatos relegatosque restituit; criminum, si quae residua ex priore tempore manebant, omnium gratiam fecit; commentarios ad matris fratrumque suorum causas pertinentis, ne cui postmodum delatori aut testi maneret ullus metus, convectos in Forum, et ante clare obtestatus deos neque legisse neque attigisse quicquam, concremavit; libellum de salute sua oblatum non recepit, contendens nihil sibi admissum cur cuiquam invisus esset, negavitque se delatoribus aures habere.[92]

The crisp question raised by these passages is how the abolition of charges for the future was formulated. Was it simply implied by the amnesty, by the obliteration of the past, or was there a separate formulation for future charges? And if the latter, was it done in casual but typically Roman fashion by the emperor rejecting the *libellus de salute sua* and announcing that he had no ears for informers, or was there a specific *ne quis maiestatis postulet?* The question can be framed the other way around. How were the exiles restored and the outstanding charges cancelled? Was it done by sifting laboriously through the records (Dio has Claudius carefully separate the wheat from the chaff,[93] but Suetonius has Caligula deny having read the *commentarios ad matris ... pertinentis*), or was there simply an overall abolition of the *crimen maiestatis,* so that what had been *maiestas* was now nothing? The methodology of Otho and Trajan suggests the latter, and Caligula's concern for the delators also implies that if the *commentarii* had not been burnt the delators would have been seen as the authors of charges which had suddenly become calumnious. Dio's language authorises a similar conclusion: he elsewhere uses κατέλυσε (= ἔπαυσε) in the sense of complete annihilation,[94] and he should be taken to have done so here.

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[92] Suet. *Cal.* 15.4.

[93] Cf. ch. I at n. 27.

[94] Thus Dio 53.2.5 (28 B.C.): (Καῖσαρ) πάντα αὐτὰ δι' ἑνὸς προγράμματος κατέλυσεν. Cf. 60.4.1, τὰ τέλη κατέλυσε (= ‚acta omnia rescidit', Suet. *Claud.* 11.3); 70.1.3. See also Mommsen, *Staatsr* 2.1132 and n. 5; Vittinghoff, 98 n. 443. Cf. *Dig.* 50.17.100.

Turning to the Claudian abolition, we observe that Dio's account[95] begins with the assertion that immunity on the Athenian pattern was promised to those who had advocated the restoration of the Republic or been considered eligible for the throne; Dio adds that the promise was carried out (τῷ ἔργῳ παρέσχε). The account then turns to the abolition of the charge of *asebeia* (τὸ ἔγκλημα = the generic *crimen maiestatis*) in respect of both writings and deeds, and the transition from the Athenian immunity is effected as follows: ... παρέσχε. τό τε ἔγκλημα τῆς ἀσεβείας ἔπαυσε. Does this mean that he abolished *asebeia* in addition to honouring the promise of immunity, or was the abolition of *asebeia* the means by which he honoured that promise? Complete annihilation is indicated in Suetonius' account of the Claudian decree, but only in respect of past offences:

> Imperio stabilito nihil antiquius duxit quam id biduum, quo de mutando rei p. statu haesitatum erat, memoriae eximere. omnium itaque factorum dictorumque in eo veniam et oblivionem in perpetuum sanxit.[96]

The close correspondence between ‚omnium factorum dictorumque' and Dio's ‚in respect of both writings and deeds' is suggestive, and so is Suetonius' assertion that Claudius kept his word (‚ac praestitit' – cf. Dio) except for a few tribunes and centurions who were put to death for having conspired against Caligula, partly as an example (cf. Josephus) and partly because they had sought Claudius' death as well.[97] But this is all that Suetonius says, and as far as the abolition for the future is concerned it has to be supposed that he has either ignored it or included it in some way in the amnesty.

The *Augustan History* includes the following among the measures introduced by Pertinax on his accession:

> Quaestionem maiestatis penitus tulit cum iureiurando, revocavit etiam eos qui deportati fuerant crimine maiestatis, eorum memoria restituta qui occisi fuerant.[98]

This passage certainly seems to have the most viable sequence: first a decree of general abolition, and then (‚etiam') whatever special objectives it was desired to achieve under the new dispensation. In other words, once there was no longer, and indeed never had been, such a crime as *maiestas*, such matters as releasing prisoners or recalling exiles were little more than routine. The question is,

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[95] Dio 60.3.5–7, 4.1–2. Cf. ch. I at n. 27.

[96] Suet. *Claud.* 11.1.

[97] Suet. loc. cit.

[98] *SHA* Vit. Pert. 6.8. Cf. Dio 74.5.2 f.; Herod. 2.4.8.

however, whether the same can be said of the amnesty on the Athenian pattern: was it a mere by-product of a general abolition, or was it (in preference to the position deduced from the Pertinax passage) in fact the decree by which the abolition was accomplished, thus making the amnesty for the past the principal objective and immunity for the future the by-product? In other words, has Suetonius, in his account of the Claudian measure, in fact given the full substance of the legislation at the time, and has Dio mistakenly inferred from the cessation of charges thereafter that there was express legislation on that aspect?

The little that can be gathered about the Athenian amnesty of 403 B. C. points to its having been concerned entirely with forgetting the past,[99] and a similar conclusion seems to be authorised for the Ptolemaic decrees analysed by Waldstein, detailed in scope though those decrees were.[100] In the Roman tradition the basic precedent (itself modelled on the Athenian decree) is the *senatus consultum* of 17 March 44 B. C. granting an amnesty to Caesar's murderers:

> Quantum in me fuit, ieci fundamenta pacis Atheniensiumque renovavi vetus exemplum; Graecum etiam verbum usurpavi, quo tum in sedandis discordiis usa erat civitas illa, atque omnem memoriam discordiarum oblivione sempiterna delendam censui.[101]

This decree was still being cited as a precedent in the late third century,[102] and although Dio states that Claudius' decree was ‚in the most precise terms ever',[103] it is a fair assumption that Cicero's *senatus consultum* of 44 B. C. was used as a model. The Claudian amnesty may therefore have to be interpreted in terms of the Ciceronian, and the question that this raises is obvious: did Cicero abolish the *crimen maiestatis*? There is evidence both for and against this unexpected possibility. On the one hand there is the *lex Pedia*, a *lex maiestatis*[104] which, it

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[99] See Lipsius, o. c. (ch. I n. 16) 1.963; A. P. Dorjahn, *Political Forgiveness in Old Athens: The Amnesty of 403 B. C.*, Evanston, 1946; Waldstein, 16 and n. 10, 25 ff., 33 f. with sources. See also Mommsen, *Strafr* 458 and n. 1; Kleinfeller, *RE* 9.1378 ff.; Mannzmann, *Kl. P.* 1.306 f. On *indulgentia* in general see, besides Waldstein pass., J. Gaudemet, ‚Indulgentia Principis', *Conferenze Romanistiche* II, Milan, 1967, 3 ff. To some extent a closer parallel to the way the Romans did it is provided by the five amnesties other than that of 403 discussed by Dorjahn, for the characteristic τοὺς ἀτίμους ἐπιτίμους εἶναι of those five is reminiscent of the exercises in nomenclature of Otho and Trajan.

[100] See Waldstein, 34 ff.

[101] Cic. *Phil.* 1.1. Cf. Dio 44.26.2 ff. – an interesting piece of imaginative writing.

[102] *SHA Vit. Aurel.* 39.4: ‚amnestia etiam sub eo delictorum publicorum decreta est de exemplo Atheniensium, cuius rei etiam Tullius in Philippicis meminit.'

[103] Dio 60.3.5: ἐκδηλότατα γὰρ καὶ ἐν τοῖς πάντων πώποτε.

[104] Bauman, *CM* 171 ff., 269, 283.

might be argued, should not have been needed in 43 B. C. if earlier *maiestas* statutes had survived the decree of March 44. But as against this, in the *Philippics* Cicero makes much of the fact that Caesar's *acta*, including his *maiestas* law, have survived,[105] apart from which the *lex Pedia* is probably capable of a more restricted explanation.[106] We therefore conclude, although with some hesitation, that the Claudian amnesty as defined by Suetonius is not the general abolition of charges: it merely sanctioned perpetual pardon and oblivion for everything said and done during the two days, leaving it to a separate *senatus consultum* (or a further clause in the same *senatus consultum* not transmitted by Suetonius) to annihilate the *crimen maiestatis* as a whole. It was that annihilation, and not the amnesty, that made it possible to recall exiles and release prisoners whose misfortunes went back to an earlier period than the two days. In the result Dio's account of the Claudian measures is substantially correct (he is quite good on public law), and the formula adopted by Pertinax is the typical formula of his predecessors as well.

Caligula's abolition was maintained until 39, when charges were reintroduced. Dio prefaces the revival with the observation that up to this time Caligula had taken the lead in maligning Tiberius, but that now he made a speech in the senate praising him and taking senate and people to task for having censured him: he as emperor had the right to do even that, but they, by criticising a former ruler, not only did wrong but also committed *asebeia*. He went through the list of those who had perished under Tiberius and showed that in most cases the senate had been responsible – by accusing some, testifying against others and voting the condemnation of all. The proof of this, deriving from the records that he had allegedly burnt, was read out by freedmen. The emperor added that he could not expect loyalty from men who had not only turned against Tiberius but had exalted Sejanus and then put him to death. He represented Tiberius as endorsing his attitude and as advising him to use harsh measures against men who were only looking for an opportunity to kill him.

At the close of his address he restored the charges[107] of *asebeia* and ordered them to be inscribed forthwith on a bronze tablet:

> Γάιος μὲν ταῦτα τ' εἰπὼν καὶ τὰ τῆς ἀσεβείας ἐγκλήματα ἐπαναγαγών, ἔς τε στήλην αὐτὰ χαλκῆν εὐθὺς ἐγγραφῆναι ἐκέλευσε.[108]

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[105] Bauman, *CM* 155 ff. See also Cic. *Phil.* 1.16–25.

[106] Bauman, *CM* 171 ff.

[107] τὰ ἐγκλήματα – not generic as in the Claudian account, but no doubt reflecting a *maiestatis crimina* in the source.

[108] Dio 59.16.8.

He then rushed out of the senate-house to a destination outside the walls (ἐς τὸ προάστειον). Senate and people were afraid at the thought of their attacks on Tiberius. The senate adjourned without transacting any business, but met again the next day and, greatly relieved at not having perished with the others, voted annual sacrifices to Caligula's clemency, to be celebrated on the anniversary of the day on which he had delivered his address.[109] They also gave him the right to celebrate an *ovatio*, as if he had defeated some enemies.[110]

The only reflection of this in Suetonius is the statement that Caligula used to cite Accius' ‚oderint, dum metuant' and that he often attacked the senate as clients of Sejanus and informers against his mother and brothers, producing the *libelli* which he had allegedly burnt and justifying the harsh policy of Tiberius as unavoidable in the face of so many credible informers.[111]

There is much more here than a leisurely revision of the *lex maiestatis*.[112] Dio implies an emergency and an urgent revival of the *lex*, and we may be able to take it further on the strength of the ostensibly inconsequential statement by Dio to the effect that Caligula rushed from the senate ‚to a destination outside the walls' and that the senate was greatly relieved next day at not having ‚perished with the others'. This appears to point to the emperor having spent a busy day at the praetorian camp (it was ἐς τὸ προάστειον – outside the *pomerium*[113]) in anticipation of what Claudius was to do in 48, but this leads to some very tricky ground: if Caligula's drumhead court martial was held straight after the revival of the *lex maiestatis*, what becomes of the argument that Claudius did not use that *lex* in the Messalina case? There are two possible answers. The first is that Claudius' schedule on the day of his return from Ostia leaves no time at all for

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[109] Ib. 59.16.8 ff.

[110] Ib. 59.16.11.

[111] Suet. *Cal.* 30.1: ‚tragicum illud subinde iactabat: „oderint, dum metuant". saepe in cunctos pariter senatores ut Seiani clientis, ut matris ac fratrum suorum delatores, invectus est prolatis libellis, quos crematos simulaverat, defensaque Tiberi saevitia quasi necessaria, cum tot criminantibus credendum esset.'

[112] *Pace* Balsdon, 150 f.: ‚The Emperor ... made two sensible innovations. When he revised the *Lex maiestatis* in A. D. 39 he gave orders that its terms and scope should be inscribed and set up on a bronze tablet. This step was calculated to remove the chance of complaint – such as had been frequently made under Tiberius – that the terms of the law were not definitely understood by the public.' This is to overstate the significance of the bronze tablet, and at the same time to overlook its true importance. The position simply was that a *lex* that had been repealed (or virtually repealed – the exact language of abolitions is probably beyond recovery: it cannot be deduced, for example, from *CTh* 9.38 or *CJ* 9.42) was being re-enacted or revived.

[113] Hammond, *The Antonine Monarchy* 176.

him to have gone to the senate in order to revive the *lex*, and in any case Tacitus would not have overlooked such a revival; moreover, if anything was calculated to stimulate a revival it was surely the conspiracy of Camillus Scribonianus, and if Claudius managed without the *lex* at that time he ought to have been able to do the same in 48. The other answer is only just visible, but it may be the right one. Dio, it will be recalled, concludes his account of the senate's meeting on the first day with the assertion that the senate adjourned without holding any debate or transacting any business.[114] We remember that Nero's revival of charges required an act of the senate as well as of the emperor, and we also note that Claudius' abolition was almost certainly given formal efficacy by a decree of the senate.[115] Caligula's abolition and revival will have needed similar endorsement, and the absence of such a decree on the day that Caligula announced a revival (the omission was remedied next day[116]) means that the revival was not yet effective when Caligula went to the camp; indeed, for all we know it may have been the senate's refusal to endorse that sent him post-haste to the cohorts.

As for the emergency that prompted the revival, it may have been the conspiracy of Aemilius Lepidus. Dio, having covered the revival of the *lex* in 59.16, retraces some of his steps in 59.22.7 and 59.23.1 (still under A. D. 39), when he says that to celebrate the suppression of Lepidus the emperor gave the soldiers money as if he had defeated some enemies, reported to the senate on this and on the trials of Agrippina and Julia Livilla as if he had escaped a great plot, and was voted an ovation. The other possible reason for the revival is the trouble with Cn. Cornelius Lentulus Gaetulicus, which also came to a head in 39. Dio says, apropos of the expedition to Gaul to crush Lentulus, that ‚he did not announce the expedition beforehand, but went ἐς προάστειόν τι and then suddenly set out on the expedition'. The only difficulty is the ovation, for after his departure for the North Caligula will not have re-entered the city until the conclusion of the campaign. A possible solution is that the Lepidus and Lentulus movements were linked.[117]

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[114] Dio 59.16.9.

[115] That Claudius' amnesty was enacted by the senate is a fair inference in the light of the procedure followed by Cicero. Moreover, Suetonius says that he recalled no one from exile except on the authority of the senate: ‚neminem exsulum nisi ex senatus auctoritate restituit.' Suet. *Claud.* 12.1.

[116] The adulatory decrees that day indicate complete capitulation after a severe crisis.

[117] On the Lentulus expedition see Dio 59.21.2. On the link between the two movements cf. Balsdon, 71 f.

4. Nero

Nero's abolition was probably by way of tacit continuation of the Claudian position rather than by fresh enactment.[118] There were two decisions endorsing the abolition within a month or two of Nero's accession, namely the refusal of a *receptio inter reos* against Carrinas Celer and Julius Densus, the former on the accusation of a slave and the latter on a charge of favouring Britannicus: ‚neque recepti sunt inter reos Carrinas Celer senator servo accusante aut Iulius Densus eques R., cui favor in Britannicum crimini dabatur.'[119] These charges may have been launched deliberately, so as to enable the senate to make a formal pronouncement – by refusing a *receptio* – which would leave no doubt that the Claudian abolition had been carried over.

Tacitus attests one incident from which it might be inferred that in the early years of the reign Nero was not prepared to entertain devious routes around the abolition. In A. D. 55, in the tense atmosphere generated by Agrippina's threat to transfer her support to Britannicus, Nero decided to employ poison against Britannicus because he was not able to frame any charge against him and did not dare to order his execution openly: ‚urgentibus Agrippinae minis, quia nullum crimen neque iubere caedem fratris palam audebat, occulta molitur.'[120] The scruples were perverse, but the abolition was secure.

It is also under 55 that Tacitus discusses the charges brought or contemplated against Agrippina. Junia Silana, seeking revenge for Agrippina's interference in her matrimonial plans, put up her clients Iturius and Calvisius as accusers, not to allege that Agrippina had mourned Britannicus or publicised the wrongs of Octavia, but to claim that she had resolved to incite Rubellius Plautus to revolt (‚destinavisse eam ... ad res novas extollere') and to marry him in order to regain her position of authority. The actor Paris and one Atimetus, both freedmen of Nero's aunt, Domitia, reported the charge to Nero in the most serious terms (‚crimen atrociter deferre'). Nero, who had spent the night drinking, resolved to kill his mother and Plautus and to remove Burrus from the praetorian prefecture. But Burrus restrained him, promising Agrippina's death if she was proved guilty of a crime (‚si facinoris coargueretur') and adding that everyone should have an opportunity to defend themselves, especially a parent; no accusers were present, said Burrus, but only a solitary voice from a hostile house (‚nec accusatores adesse, sed vocem unius ex inimica domo adferri'), and regard should also be had

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[118] Cf. at n. 19.

[119] Tac. *Ann.* 13.10.3.

[120] Ib. 13.15.4.

to the lateness of the hour and to the fact that the whole story looked like a rash conclusion on insufficient grounds (‚omnia temeritati et inscitae propiora').[121]

Next day Burrus visited Agrippina, informed her of the allegations (‚obiecta') and told her that she must either refute them or pay the penalty (‚dissolveret vel poenas lueret'). He discharged this mandate from the emperor in the presence of Seneca and some imperial freedmen who were there as witnesses to the conversation. Burrus disclosed the charges and the accusers (‚crimina et auctores') and took up a threatening attitude (‚a Burro minaciter actum'). Agrippina said that the accusers' desire to render an old woman a last service was no reason why she should incur ‚infamia parricidii' or Nero ‚conscientia parricidii'.[122] She recapitulated everything that she had done to secure the throne for Nero, and said that if she were to be charged with anything it should be with what she had done on his behalf.[123] If Plautus became emperor and sat in judgment on her there would be no lack of accusers to charge her – not with indiscreet remarks prompted by her love for her son, but with the crimes that she had committed on his behalf.[124]

Agrippina demanded an interview with Nero, and there, neither making submissions in her defence nor reminding him of what she had done for him, the former because it might have implied that there were charges to meet and the latter because it might have implied reproach, she secured punishment for the accusers and rewards for her friends: ‚conloquium filii exposcit, ubi nihil pro innocentia, quasi diffideret, nec de beneficiis, quasi exprobaret, disseruit, sed ultionem in delatores et praemia amicis obtinuit.' Junia Silana was exiled, Calvisius and Iturius were relegated, and Atimetus was executed. Paris was not punished. Plautus was left alone for the present.[125]

It is clear that Agrippina was not tried. The proceedings conducted by Burrus were a preliminary interrogation on the question of whether there should be a *receptio inter reos*.[126] The dossier forwarded to Nero persuaded him that there was no case for her to meet, and this explains why she neither urged her inno-

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[121] Ib. 13.19.3 f., 20.2 ff.

[122] Ib. 13.21.1–6.

[123] Ib. 13.21.7, on which see Furneaux, 2.180.

[124] Ib. 13.21.8.

[125] Ib. 13.21.9, 22.3.

[126] Greenidge, *Legal Procedure* 463 supposes that the quaestionary procedure (and if so, the procedure in the senate or the emperor's court) allowed the accuser to interrogate the accused at the *nominis delatio* in order to make out a *prima facie* case. Contra Mommsen, *Strafr* 388, but the question is an open one. Agrippina was certainly not on formal trial when Burrus questioned her.

cence nor pleaded *beneficia:* she was not called upon to answer charges. The accusers were punished for *calumnia,* which is of course precisely what Burrus foresaw the night before when he inferred that the charges were the result of *temeritas.*[127] The case also lends important support to the employment of charges of *parricidium* when *maiestas* was in abeyance: Agrippina specially said that she did not want to incur ‚infamia parricidii'. The probabilities are that at no stage did the accusers seek to label the charges as *maiestas.*

Agrippina's case is followed in Tacitus by the case of Burrus and Pallas, charged with conspiring to give the throne to Cornelius Sulla. The accuser, one Paetus, was notorious for buying up confiscated properties, and on this occasion he was manifestly guilty of falsehood (‚vanitatis manifestus'). Tacitus notes the innocence of Pallas as an automatic consequence of the accuser's manifest guilt.[128] As for Burrus, the only reference to him is the curious statement that he recorded a vote among the judges, although himself an accused: ‚Burrus quamvis reus inter iudices sententiam dixit.'[129] Pateus was exiled and his records resuscitating forgotten debts to the treasury were burnt.[130] Burrus' dual rôle is attributed by Kunkel to his participation in the *calumnia* process against the accuser after his own acquittal,[131] but if he had been acquitted he should no longer have been ‚quamvis reus'. Perhaps he took part in the vote on a *receptio inter reos,* it being felt that on a manifestly false charge there was no need for a member of the *consilium* to vacate his seat.

There was an interesting variation on a theme in the proceedings against Cornelius Sulla in 58. A scuffle broke out at the Milvian Bridge during one of Nero's nocturnal jaunts, raising the suspicion that Sulla had organised a plot against Nero. No slave or client of Sulla could be identified as having taken part in the scuffle, but Sulla was ordered, just as if he had been convicted (‚proinde tamen quasi convictus esset'), to go into exile.[132] Much progress had been made since Agrippina's *quasi crimina* against Britannicus.

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[127] Cf. *Dig.* 48.16.1 pr.: ‚accusatorum temeritas tribus modis detegitur et tribus poenis subicitur: aut enim calumniantur ...'

[128] Tac. Ann. 13.23.1–3.

[129] Ib. 13.23.4.

[130] Ib.

[131] Kunkel, *Konsilium* 279 n. 61.

[132] Tac. *Ann.* 13.47.1–4.

5. Titus: The oath not to put senators to death

The abolitions from Galba to Vespasian do not raise any problems. Galba's restoration of Neronian *maiestas* exiles[133] presupposes an abolition of the *crimen* as a whole, and this is confirmed by Galba's reputation for executing people without trial.[134] Otho's abolition has already been noticed, and Vitellius is on all fours with Galba.[135] Vespasian honoured his abolition fairly well,[136] except for Titus' procedures as praetorian prefect and the case of Alienus and Marcellus.[137]

Titus' own reign marks a new departure. On the face of it his credentials are excellent. He said that he would neither bring charges himself nor allow others to do so, since he had done nothing to merit insults and previous rulers could look after themselves.[138] It is also said that he exercised rigid self-control in the face of conspiracies.[139] And yet he is the first emperor from whom the senate demanded a new guarantee in the shape of an oath not to put senators to death.[140] Dio specially notes that this oath was honoured despite conspiracies,[141] and this evidently implies some connection between the oath and the abolition of charges, but what exactly was the connection? In Bleicken's view the oath was the main factor, and the abolition of charges was merely a safeguard against the emperor circumventing his oath by bringing charges in a compliant senate,[142] but the converse is much more likely, namely that the oath was demanded in order to close the loopholes not covered by the abolition. That is precisely why the oath is attested as an adjective factor in Pertinax's abolition (‚quaestionem maiestatis penitus tulit cum iureiurando'), and it can safely be inferred that the position with other emperors was the same.[143] The problem facing potential victims was,

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[133] Dio 64.3.4c (8.200 Cary).

[134] Plut. *Galb.* 15.1: ‚Galba ordered Nymphidius' accomplices to be put to death. ... It was considered illegal and contrary to a *civilis animus*, although just, to put men of distinction to death without trial.' Suet. *Galb.* 14.3: ‚quosdam claros ex utroque ordine viros suspicione minima inauditos condemnavit.'

[135] Suet. *Vit.* 8.1, 14.4.

[136] Cf. Dio 65.9.1. Vespasian's only reaction to anonymous pamphlets was to put up pamphlets in reply. Dio 66.11.1.

[137] Ib. 65.16.3.

[138] Cf. ch. IV at n. 29.

[139] Dio 66.19.1 f., 18.1. Cf. Suet. *Tit.* 9.1.

[140] Cf. Bleicken, 118 f. Garnsey, 44 f. argues well against an oath by Vespasian but is less successful with his assertion that there was no oath by Titus. Cf. n. 141.

[141] Dio 68.2.3: ὤμοσε δὲ καὶ ἐν τῷ συνεδρίῳ μηδένα τῶν βουλευτῶν φονεύσειν, ἐβεβαίωσέ τε τὸν ὅρκον καίπερ ἐπιβουλευθείς.

[142] Bleicken, 119 f. [143] Cf. at nn. 164, 165–6, 171, 173.

after all, not that they might be executed after an unfair trial but that they might, in order to circumvent the abolition, be executed after no trial at all. It was no accident that the first emperor to be asked for such an oath was Titus, the man whose exploitation of *populi furor* to satisfy private enmities had led men to expect a second Nero.[144]

Let us look more closely at these executions without trial. There are two questions: by virtue of what power did the emperor execute summarily? and why did he always insist on disguising the fact that he was doing so, on making it appear as if the people, enraged at the wrongdoer's manifest guilt, had given the emperor some sort of mandate to kill? It has recently been argued by Marongiu that every emperor was vested with an arbitrary *ius vitae necisque* analogous to the power of a *paterfamilias* which was generated by the mere fact of its exercise and was symbolised by wearing the *pugio*.[145] There is much that could be said in support of this important proposition, especially in regard to its *pater patriae* connotations,[146] but the trouble is that we need something which was not absolute and self-sufficient,[147] something which consciously[148] needed to be reinforced by popular acquiescence. It clearly cannot be supposed that the *pater patriae* was using the arenas and camps as some sort of *ad hoc consilium*, not least because the people's support, far from being expressed as a deliberate or considered verdict, was expressed in terms of *populi furor*, red rage. This instantaneous rage at the sight (or presumptive sight – there is considerable room for legal fictions here) of the wrong done to the emperor has something in common with the primitive notion that it was the duty of every member of the

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[144] Suet. *Tit.* 7.1; cf. 6.2 i. f. Suetonius thought that Titus had taken office as pontifex maximus in order to ensure that he did not put anyone to death, *Tit.* 9.1, but there is something badly askew with the whole of Suetonius' picture of Titus. Cf. e.g. ‚ut non temere quis tam adverso rumore magisque invitis omnibus transierit ad principatum', 6.2 with ‚natura autem benevolentissimus', 8.1 or with 9.1 ff.

[145] Marongiu, pass. The work has weaknesses – neither ‚il mito di un' *auctoritas*' nor ‚il feticismo dei testi legislativi' is likely to attract support –, but also many strengths.

[146] For the writer's views on *pater patriae* see Bauman, *CM* 235 ff. and the present work pass.

[147] Marongiu, 453 puts it as follows: ‚Un potere del *princeps* sommo e assoluto, il quale comprendeva addiritura il potere di vita e di morte e l'arbitrio della sorte e delle fortune, morali e materiali, dei cittadini. Nell'esercitare tale sconfinato potere, il principe non compiva usurpazioni e delitti, bensi atti leciti e giuridicamente validi: *Caesari omnia licent.*' This presupposes a universal acceptance at variance with what was said about Galba (n. 134) and with the criticisms levelled at Claudius and Nero.

[148] Titus specifically sought the consent of the arenas and camps, ‚quasi consensu ad poenam deposcerent'. Suet. *Tit.* 6.1. Claudius did not proceed against Chaerea or Messalina's co-adulterers until the populace or the cohorts had indicated their assent.

household to assist the *paterfamilias* in tearing the wrongdoer limb from limb,[149] and it also has roots in the fact that by the oath of allegiance the entire *populus Romanus* (not as such, but the distinction was academic[150]) had assumed the same *inimici* as the emperor.[151] Rage is the dominant motif in all such cases. Caligula persuaded the senators to cut one of their number to pieces on the grounds that he was a *hostis publicus;*[152] Narcissus knew that the time was ripe when he had worked Claudius up to the point of being ‚incensum et ad minas erumpentem';[153] Nero was ‚saevienti principi' when he pronounced sentence of death on Seneca without trial;[154] and Domitian killed Paris ‚in the middle of the street'.[155] It may also be thought that when M. Aquilius Regulus tore Piso's head with his teeth[156] he was (in legal theory) still under the influence of the universal rage against Otho's *inimicus.*[157] Similar symptoms of rage had been shown towards enemies of the state whose guilt was manifest both in the regal period and in the Republic. Thus, the lamentations of Horatius' sister ‚movet feroci iuveni animum' and summary execution followed;[158] and in 133 B. C. Nasica was ‚sudans, oculis ardentibus, erecto capillo, contorta toga',[159] and mayhem followed. The victim was *iure caesum,* lawfully killed,[160] and it will be recalled that the doctrine went back, at least in the case of the nocturnal thief, to the XII Tables.[161] As in the Gracchan period, so at the time of *Apocolocyn-*

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[149] On this concept see Strachan-Davidson, *Problems of the Roman Criminal Law,* Oxford, 1912, 1.36 ff.

[150] Cf. ch. V at nn. 9–14.

[151] On the obligations under the oath see Bauman, *CM* 223 ff. See also this study, ch. V at nn. 9–14.

[152] Suet. *Cal.* 28.

[153] Tac. *Ann.* 11.35.3.

[154] Ib. 15.61.4, where Poppaea and Tigellinus are ‚saevienti principi intimum consiliorum'. The phrase may be technical – the special *consilium* for extra-judicial punishments. So perhaps *Lex. Tac.* 673 B – ‚geheimes Kabinett'. Contra Koestermann, *TA* 4.300.

[155] Dio 67.3.1.

[156] Tac. *Hist.* 4.42: ‚post caedem Galbae datam interfectori Pisonis pecuniam a Regulo adpetitumque morsu Pisonis caput.'

[157] Ib. 1.44: ‚nullam caedem Otho maiore laetitia excepisse, nullum caput tam insatiabilibus oculis perlustrasse dicitur, ... Pisonis ut inimici et aemuli caede laetari ius fasque credebat.'

[158] Livy 1.26.3.

[159] *Ad Herenn.* 4.68.

[160] Vell. 2.4.4. The issue was contentious from the start (see, most recently, Bauman, *Duumviri*), and does not seem to have died a natural death in 63 B. C. as one might have expected.

[161] Cf. ch. VII at n. 69.

tosis and *Octavia* this doctrine was keenly contested, the only difference being that over the intervening centuries the opposing forces had somehow changed places. There is reason to think that what the senate really wanted from Titus in 79 was an assurance that he would not lose his temper.

Domitian probably allowed charges to be in abeyance in the early years of the reign,[162] but he was adamant about not being prepared to take an oath not to put senators to death, and it was when the senate passed a *senatus consultum* declaring it to be unlawful for the emperor to put senators to death, and when pressure was put on him to uphold the *acta* of Divus Titus in this regard, that Domitian began depreciating his deified brother.[163]

6. Marcus: The virtues of the crimen parricidii

There are no major developments to report from Nerva to Antoninus Pius. Nerva himself abolished charges, added an oath, and kept his word in spite of plots.[164] Trajan presumably did the same: there is no trace of his renowned ingenuity having been used otherwise than against delators, except of course in the matter of making *servorum quaestiones* more flexible. Hadrian's oath is secure[165] and his abolition is established by the ‚maiestatis crimina non admisit' noted by the *Augustan History* in a list of decisions rendered by Hadrian and his *consilium*.[166] He is also credited with ignoring those whom he had regarded as *inimici* in private life.[167] But he has a bad press for the execution of the four consulars,[168] although he declared on oath that it was not his work[169] (Claudius had merely said that he did not know, and Vespasian's signature might have been forged). Some other breaches of his undertaking are attested, including an execution for verbal injury.[170] Antoninus Pius has an excellent record, his ob-

[162] Cf. ch. VI at nn. 202–25.

[163] Dio 67.2.4. Dio adds that it did not make much difference whether a senator was despatched by the emperor privately or with the consent of the senate. See also ch. VI at n. 197.

[164] Dio 68.1.2, 2.3.

[165] *SHA Vit. Hadr.* 7.4; Dio 69.2.4.

[166] *SHA Vit. Hadr.* 18.4.

[167] Ib. 17.1: ‚uni, quem capitalem (*sc.* inimicum) habuerat, factus imperator diceret „evasisti".'

[168] Dio 69.2.5 f. *SHA Vit. Hadr.* 7.1–4 is more sympathetic. On the whole episode see Syme, *Tacitus* 1.244 f.

[169] Dio 69.2.6. Cf. *SHA Vit. Hadr.* 7.3 (holding the senate responsible).

[170] Dio 69.2.6; *SHA Vit. Hadr.* 15.2–9. And esp. Dio 69.4.1–5, recording the punishment of Apollodorus the architect for criticising Hadrian's drawings for the temple of Venus and Roma.

servance of his abolition and oath[171] being near perfect. Atilius Titianus and Priscianus died for *affectatio regni*, the former by judgment of the senate and the latter by his own hand, but the emperor vetoed proceedings against their accomplices; and for the rest his commitments were honoured so scrupulously that a confessed parricide was merely marooned on a desert island.[172]

Marcus Aurelius is highly commended by the literary sources for his attitude to *maiestas*. Both an abolition and an oath are readily deducible, although not expressly attested,[173] but his adherence to his engagement must be measured (apart from the temporary lapse in the case of Flavius Calvisius[174]) by his handling of the Cassian crisis. At first sight he was almost painfully anxious to avoid putting senators to death,[175] having not only referred the accomplices to the senate but having also written to that body asking it not to inflict the death penalty.[176] This gratuitous assumption of a responsibility not imposed by his oath was later inflated into a general amelioration of penalty by Marcus,[177] but as he is also credited with relentless severity ‚contra manifestos et gravium criminum reos'[178] we may be facing the familiar double standard – but only against non-senators, since there is no suggestion of a breach of the oath. The question is, however, why Marcus was so concerned about the Cassian accomplices that he specially intervened against the death penalty. The answer that it is proposed to argue is that ‚the other charge' on which they were tried by the senate was *parricidium*, and that the particularly unpleasant method of execution prescribed for that crime[179] was more than Marcus could tolerate.

It is clear that any charge deputising for the *crimen maiestatis* must have been based in some way on the attempt on the emperor's life, and this eliminates all public criminal laws except *Cornelia de sicariis* and *Pompeia de parricidiis*. In favour of the former is its connection with occult practices, and also the fact that the compilers could not agree on whether a law laying down ‚utpote maiestatis

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[171] *Vit. Pii* 7.2., 8.10, 13.4.

[172] Ib. 7.3 f.; 8.10. On the possible doublet of the case of Titianus in *Vit. Hadr.* 15.6 see Bleicken, 120 n. 5.

[173] Cf. Bleicken, 119 n. 4.

[174] Cf. at n. 6 above.

[175] Dio 71.24–28 (9.40–48 Cary); *SHA Vit. Marc.* 24.8, 25.5 ff., 26.10 ff., 29.4; *Vit. Av. Cass.* 7.5 ff., 8.1, 8.7.

[176] Dio 71.30.1 f.; *Vit. Av. Cass.* 8.7.

[177] *Vit. Marc.* 24.1: ‚erat mos iste Antonino ut omnia crimina minore supplicio quam legibus plecti solent puniret.'

[178] Ib.

[179] On this penalty, and on its retention (or reintroduction) in the early Principate despite *Dig.* 48.9.1 see Mommsen, *Strafr* 645 f., 923.

reus gladio feriatur' for assassination was a *lex de sicariis* or a *lex maiestatis*,[180] but a better case can be made out for *parricidium*. The large and treacherous issues raised by this crime[181] need not be debated here, but attention must be drawn to the interchangeability of *parricidium* and *perduellio* in at least one well-known legend[182] and to the use of *parricidium/parricida* with reference to murderers of magistrates and rebels against the state.[183] We also recall the close link between the torture of free men and *parricidium* in Suetonius' account of Claudius' sadistic tendencies,[184] as well as Antoninus Pius' reduction of the penalty for *parricidium* to deportation[185] – gratuitous sollicitude if it was an ordinary case under the *lex Pompeia*, since the oath not to put senators to death applied only to political crimes,[186] but understandable if that *lex* was being used in respect of an attempt on the emperor's life. As for the precise juristic basis on which the *lex de parricidiis* may have been brought into it, an interpretation of the *pater patriae* into its ‚si quis patrem occiderit' category[187] is quite possible. But there may be even better evidence. Bearing in mind that accomplices were being charged, it is most significant that the question of whether charges against *conscii* were allowable under the *lex Pompeia de parricidiis* was considered in an opinion expressed by L. Volusius Maecianus: ‚utrum qui occiderunt parentes an etiam conscii poena paricidii adficiantur, quaeri potest. et ait Maecianus etiam conscios eadem poena adficiendos, non solum parricidas.'[188] Maecianus was, of course, a *consiliarius* of both Pius and Marcus, and the latter's law tutor.[189]

So far so good, but the whole matter is thrown into the melting-pot by the fragments from Paul *de publicis iudiciis* and Marcian *liber primus de publicis iudi-*

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[180] CTh 9.14.3, *Ad Legem Corneliam De Sicariis; CJ* 9.8.5, *Ad Legem Iuliam Maiestatis*. See Bauman, *Lex Quisquis*.

[181] See U. v. Lübtow, *Das römische Volk*, Frankfurt a/M, 1955, 256ff.; Kunkel, *Untersuchungen* 39f., 66, 139 n. 476. On the *quaestio* phase of *parricidium* see Mommsen, *Strafr* 643ff.

[182] Bauman, *Duumviri*.

[183] Cic. *Ad Fam.* 12.3.1: ‚in statua ... inscripsit PARENTI OPTIME MERITO; ut non modo sicarii, sed iam etiam parricidae iudicemini.' Caesar was of course *pater patriae*. Bauman, *CM* 137ff. Cicero's letter was before the *lex Pedia* subsumed Caesar's murder under *maiestas*. See also Tac. *Hist.* 1.85: ‚hostem et parricidam Vitellium vocantes.' Cf. Sall. *Cat.* 31.8, 52.32; Cic. *Ad Fam.* 10.23.5, *Phil.* 2.17, 31; Tac. *Ann.* 4.34.5, 15.73.4; Dio 74.13.3.

[184] Cf. at n. 40 above.

[185] At n. 172 above.

[186] Cf. Bleicken, 120.

[187] *Dig.* 48.9.1.

[188] Ib. 48.9.6.

[189] Crook, *Consilium* 190; Kunkel, *Herkunft* 174.

ciis ad legem Iuliam maiestatis embedded in *CJ* 9.8.6. Paul says that where any act ‚contra maiestatem imperatoris' is alleged the charge can be pressed even after the death of the accused, and he cites the posthumous confiscation of property decreed by Marcus against ‚Depitianus utpote senator, qui Cassiani furoris socius fuerat.'[190] Marcian similarly credits Marcus with the introduction of posthumous charges in *maiestas* cases.[191] Mommsen inferred that ‚Depitianus' was ‚Druentianus Cassii gener'.[192] That name is as little attested as the one cited by Paul, but if Mommsen meant Druncianus, the son-in-law of Cassius, the position becomes very wild, for *SHA Vit. Marc.* 26.12 and *Vit. Av. Cass.* 9.4 say that Druncianus and Cassius' daughter, Alexandria were placed under the protection of the emperor's uncle and were allowed to travel wherever they wished, to which *Vit. Av. Cass.* adds the most interesting fact that Marcus convicted certain people under the *actio iniuriarum* for insulting Druncianus and Alexandria (‚damnatis aliquibus iniuriarum, qui in eos petulantes fuissent') – undoubtedly the *publicum iudicium* under the *lex Cornelia*. But whatever the identity of ‚Depitianus', the point is that the Severan jurists believed that a senator had been posthumously charged with *maiestas* by Marcus. This raises a formidable body of expert opinion against Dio's averment that Marcus used ‚some other charge', but Dio has earned the right to be heard here by not attempting to conceal the fact that Marcus had cheated in Flavius Calvisius' case. A possible solution is that as a general rule the accomplices were charged with *parricidium*, but that in the case of the senator who died it was felt that the only way to lay hands on his estate was through the *crimen maiestatis*, that old and tried method of replenishing the *fiscus*.

The position of Marcus is, however, not altogether satisfactory. Once the case of the Cassian senator has to be added to that of Flavius Calvisius it becomes difficult to attribute it all to a temporary lapse, especially as in the senator's case there had to be a formal ruling on a new point of law. Marcus could no doubt still claim with formal truth that he had never put a senator to death, *SHA Vit. Marc.* 29.4, but there was a great deal of special pleading in such an assertion.[193]

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[190] Paul goes on to say that in this charge slaves can be examined against their masters ‚quod ad laesam maiestatem imperatoris pertinet', but he does not refer that rule to Marcus.

[191] Caligula, and after him Nero and Domitian, had anticipated Marcus, but only for inofficious testaments, not conspiracies.

[192] P. Krueger, *Codex Iustinianus* 374 n. 3.

[193] There is no evidence of an abolition of charges by Commodus. Pertinax kept to his abolition by refusing to sanction charges against Falco. Dio 74.8.5; *SHA Vit. Pert.* 10.1–7. Severus undertook neither to put any senator to death nor to confiscate property without trial. Herod. 2.14.3; Dio 75.2.1; *SHA Vit. Sev.* 7.5. A *s. c.* was passed, laying

7. Tiberius: ‚Nam legem maiestatis reduxerat'

Was Tiberius invited to abolish charges at the beginning of his reign? Such an invitation is implied by Koestermann, apropos of the passage in which Tacitus says that Tiberius did not qualify for a *civilis animus* because he had ‚reintroduced' the *lex maiestatis* (‚nam legem maiestatis reduxerat').[194] Tacitus goes on to say that in reply to the praetor's enquiry ‚an iudicia maiestatis redderentur' Tiberius replied ‚exercendas leges esse'; he too, adds Tacitus, was exasperated by the circulation of covert *carmina* attacking his cruelty and arrogance and his differences with his mother.[195] Koestermann's explanation of this passage is that Tiberius was reviving a law which had fallen into disuse, thus disappointing the many senators to whom the *lex* was ‚ein Dorn im Auge' and who had put up the praetor to test Tiberius' sentiments.[196]

In effect, then, Koestermann postulates an invitation to strike the keynote of the new reign by abolishing charges of *maiestas*, but the probabilities are not in favour of this interesting hypothesis. First, the suggestion that ‚reduxerat' implies the re-enactment of an obsolete law. Tacitus does not elsewhere use ‚reducere' in this sense,[197] and in any event this could not be his meaning here. If a *lex* could be abrogated by disuse at all it was only after a substantial period of oblivion,[198]

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down that if the emperor breached his undertaking, he, together with his accomplices and their children, would be *hostes*. Dio loc. cit. However, Severus breached the law, and included among his victims Julius Solon who had drafted it. Dio 74.2.2; cf. Herod. 2.14.4. Macrinus restated the Severan *s. c.*, judging by the fact that he obtained immunity for Aurelianus by arguing that a senator could not be put to death without impiety. Dio 78.12.2.

[194] Tac. *Ann.* 1.72.2 f.

[195] Ib. 1.72.4 f. Some of the *versiculi* attacking Tiberius are quoted in Suet. *Tib.* 59. Their chronological range is from A. D. 4–14 (‚non es eques; quare? non sunt tibi milia centum') to well into Tiberius' reign (‚regnavit sanguine multo, ad regnum quisquis venit ab exsilio'). The opening couplet deals with differences between Tiberius and Livia (‚dispeream, si te mater amare potest'), so that if Suetonius has arranged his material in chronological order this one will also go back to A. D. 4–14, and therefore to an earlier date than the praetor's enquiry which (*pace* Koestermann, *Majestät* 78) was at the beginning of 15 rather than at the end.

[196] Koestermann, *Majestät* 76 ff.; *TA* 1.236: *‚legem maiestatis reduxerat*, d. h., nachdem es schon ausser Gebrauch gekommen war', ‚als etwas aus dem Gebrauch Gekommenes'. Cf. H. Goelzer, *Tacite: Annales*, Paris, 1938, 53.

[197] Cf. *Lex. Tac.* 1366. Furneaux, 1.274 queries Tacitus' ‚implied assertion that it had become obsolete', but accepts this as the meaning. Cf. Rogers, *Trials* 8; Marsh, 106 f. Pliny, however, speaks of ‚induceret', not of ‚reduceret'. Cf. ch. I at nn. 43, 68.

[198] *Abrogatio* is noticed by Mommsen, *Staatsr* 3.1239 only briefly, and by Siber, *Röm. Verfassungsrecht* not at all. The general principle is stated by Julian *Dig.* 1.3.32.1:

a condition fulfilled neither by the *lex* which Koestermann assigns to ‚the very last years of Augustus' nor by the legislation of A. D. 6 and 8.

The political background is equally unfavourable. ‚Ein Dorn im Auge' is not how Seneca saw the senate's reaction to charges of treasonable defamation under Augustus,[199] nor is the praetor who put the question, Q. Pompeius Macer, a likely spokesman for the dissident group in the senate. He may or may not be the *amicus* of Tiberius alluded to by Strabo,[200] but he is certainly the man who took part in the production of the *Ludi Victoriae Caesaris* in July of A. D. 15,[201] and this fact is surely decisive, for a man who had launched a veiled attack on the regime in January would neither have wished nor been encouraged to associate himself with a peculiarly Julian festival[202] in July.

The truth of this matter may be that a chance enquiry by the praetor was blown up into much more than it really warranted. To Tacitus and Suetonius it was almost a routine matter for an emperor to mark his accession by an abolition, and nothing proved Tiberius' bad faith more clearly than his apparent failure to conform. In fact, however, the occasion may have been perfectly innocuous. A praetor who was a friend of Tiberius might have decided, on receiving a *postulatio* for covert libel, to consult the emperor before accepting a charge that might expose his character to debate in open court, and may have received a curt reminder (Tiberius, as the sources stress, did not mind submitting his character to scrutiny) that the praetor in charge of the *quaestio maiestatis* was there to enforce the laws, not to question them. Another possibility is that the praetor wished to frame his jurisdictional edict for the year, but was not

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‚illud receptum est, ut leges non solum suffragio legis latoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.' Cicero was less convinced of the possibility of even express repeal: ‚neque ulla (*sc.* lex) est quae non ipsa se saepiat difficultate abrogationis.' *Ad Att.* 3.23.2. See also Bauman, *CM* 69 f.

[199] Sen. *Ben.* 27.1: ‚sub divo Augusto nondum hominibus verba sua periculosa erant, iam molesta.'

[200] See Strabo 13.2.3 p. 618. The genealogy of the praetor's family is most mysterious. Cf. Syme, *Tacitus* 2.748 f.; Koestermann, *TA* 2.283. Certain members of the family were charged with *maiestas* in 33 (ch. IV at n. 71), but whether they included the praetor of 15 is impossible to tell. There is one other curious feature. Suet. *Tib.* 57.2 i. f., 58.1 has an *eques R.* by the name of Pompeius oppose some action of Tiberius in the senate, causing the emperor to threaten him with imprisonment; and at about the same time (‚sub idem tempus') an unnamed praetor asks ‚an iudicia maiestatis cogi iuberet' and receives the same ‚exercendas esse leges' in reply as that attested by Tacitus for Pompeius Macer's enquiry. It may not be irrelevant that one of the accused in the trial of 33 was an *inlustris eques Romanus.*

[201] *ILS* 9349.

[202] G. Wissowa, *Religion u. Kultus d. Römer*, Munich, 1902, 128, 238, 340 n. 5, 388.

certain whether the edict of A. D. 8 had survived Augustus' death. His not unreasonable doubts (many problems accompanied the first succession) may have provoked a non-committal reply from Tiberius, who may not yet have been ready to give a ruling on the specific question of Augustus' edicts (in fact he did not do so until late in A. D. 15, after the first unsuccessful *maiestas* cases[203]).

A much more significant ruling is that given by Tiberius in Appuleia Varilla's case in A. D. 17, when he stipulated – after an adjournment – that no verbal attack on Livia of any description was to form the basis of charges against anyone: ‚ne cui verba in eam quoquo modo habita crimini forent.'[204] The ruling in respect of similar attacks on himself probably also goes back to this occasion,[205] and if regard is had to the further fact that there was no activity on the defamation front from this time until the advent of Sejanus,[206] it may legitimately be wondered whether there was some sort of formal cessation in A. D. 17 which was only terminated when a special mandate was given to Sejanus to put down the Julian faction – assuming, of course, that there was such a mandate.[207] But in the absence of further evidence none of this can be anything more than speculation, and in any case there is more than enough proof of the enforcement of charges under the Republican categories prior to Sejanus' ministry,[208] so that the most that can be said is that Tiberius may have given an indication that insults to himself and his *domus* should not be charged as *maiestas* in the absence of seditious or other special connotations, but that he did not formally suspend the *lex maiestatis* in any way.[209]

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[203] Cf. ch. IV at n. 65.

[204] Tac. *Ann.* 2.50.3. Cf. ch. IV n. 52, ch. V n. 4.

[205] Cf. ch. V n. 4.

[206] Cf. ch. V sec. 2.

[207] Cf. ch. V at nn. 74–8.

[208] The case of Cn. Piso in 20 included the Republican charges of inciting his troops to sedition and regaining his province by force, to name only one case. Cf. ch. V at n. 2. *Maiestas* was also charged against Caesius Cordus in 21 (ch. V at n. 1), and there are other examples.

[209] There is something odd about the tense of ‚nam legem maiestatis *reduxerat*'. Is Tacitus quoting an opinion expressed some time after A. D. 15? And if so, could it be an opinion expressed after Tiberius' death, during a ‚trial' (cf. Weinstock, 386 ff.) in the senate on his eligibility for consecration?

IX. RETROSPECT

If anything emerges unmistakably from the investigation, it is that in the matter of treason against the emperor the Roman criminal law displayed a degree of ingenuity and flexibility never exceeded in all its long and varied career. This is exemplified most clearly by the ability of the *crimen maiestatis* to be a creative instrument as well as a repressive one, to contribute substantially and significantly to the institutionalisation of the Principate. The transmutation of desecration of images into a right of asylum, the stigmatisation of ill-treatment of provincials as an affront to the Divus and the emperor, the enlargement of the imperial corpus, the consolidation of imperial solidarity – all these played their part in defining and delineating the new concepts needed by the new order.

The most important of the institutional functions of the *crimen maiestatis* was imperial solidarity, the fostering of the new corporate identity that was the Principate. This concept enlisted the *maiestas* categories in all their parts, from the case of the unnamed victim with its infinite scope for interpretation to the implacable punishment of those who dared to kill an emperor, even when it was to their act that the successor owed his throne. The concept was also fostered in less obvious ways; one recalls, for example, Caligula's claim to have been advised by the shade of Tiberius to be on his guard against plots, or Nero's adoption of Divus Augustus and Divus Julius as the frame of reference for Diva Poppaea.

Some of the postulated categories may encounter resistance. It may be felt, for example, that the efficacy of imperial rescripts or the rationale for setting aside wills which did not mention the emperor should be sought elsewhere than in the *maiestas* area. But the evidence points to the *crimen maiestatis*, and unless some other *lex* can be shown to offer a better explanation for the undoubted public criminal proceedings in these matters, the postulate must be accounted a reasonable one.

The use of the *crimen maiestatis* to uncover other crimes and the systematic exploitation of that facility by Sejanus have been firmly established, and this phenomenon is closely akin to the institutionalising aspects. Somewhat distant from those aspects, but no less significant for that, is the proposition which sees access to the evidence of the accused's slaves as one of the prime factors in the extensive employment of the *crimen maiestatis*. All the episodes discussed from

the crisis of A. D. 6 down to the devious legislation of Trajan and Hadrian, point irresistibly to the validity of this proposition. The interaction between *maiestas* and adultery consequent upon the extension of a similar advantage to the *accusatio adulterii* has also been sufficiently made out. One might have wished to say more about the torture of free witnesses in *maiestas* cases, but the evidence for the early Principate is sporadic and uncertain, and Pliny does not make this one of his grounds of attack on *maiestas*.

The originating legislation for verbal treason is secure, and so are the arguments anchoring the new category in the sedition area of the *lex maiestatis* and making it available for the defence of the reputation of any *inlustris*. This may shatter some illusions, but the massed evidence of Tacitus, Dio and Ulpian brooks no denial. The parallel rôle of the *iudicium publicum* under the *lex Cornelia* is also secure, not only because it was undoubtedly used under emperors as far apart as Nero and Marcus, but also because a *iudicium publicum* was the sole remedy of the unnamed victim: if this had meant his restriction to the *quaestio maiestatis*, he would have been entirely without redress during the lengthy periods of abeyance of the *maiestas* court.

The other substitutes for *maiestas* also carry conviction. With *populi furor* and manifest guilt, occult practices, *parricidium*, quasi charges, quasi convictions, the *accusatio adulterii*, the torture of all classes and ‚accidental' disclosures by slaves all deputising for the conspiracy category, and with *renuntiatio amicitiae*, the *actio legis Corneliae*, *censoria potestas* and *quasi crimina* available as substitutes in cases of insult, no emperor had any reason to regret the dormancy of the *lex maiestatis*. The problem of a real division between the Republican categories and insults has thus been solved. There was in fact no such division, not even when the late classical jurists abandoned their detachment and permitted themselves to become involved in ‚other charges of that sort'. They were entitled to perpetuate the fact that at the very beginning, in 2 B. C., there had been an extra-legal sector, but they should have gone on to point out that the ruling of A. D. 17 in favour of Divus Augustus, followed by the attempted *impietas in principem* of 37 and the successful exploitations of that concept by Caligula, Nero and Domitian, had made *principalis maiestatis veneratio* an indissoluble part of the *crimen maiestatis p. R. minutae*, a part whose enforcement or non-enforcement depended as much on the policies of individual emperors as on any further legislative or juristic formulations. Attempts might be made to draw a distinction within the *maiestas* categories between acts which realistically affected the security of the state and acts which did not, as Tiberius and Ateius Capito did in the early years of the Principate, and as Ulpian (or a later editor) would still be trying to do much later – ‚perduellionis reus, hostili

animo adversus rem publicam vel principem animatus, ... ex alia causa legis Iuliae maiestatis reus' (*Dig.* 48.4.11) –, but such attempts could not hope to succeed. *Maiestas* was in the eye of the beholder, and when Nero looked at Thrasea Paetus' contempt for Diva Poppaea or for the divine voice he saw not merely an *ex alia causa reus* but a *hostis*. The fusion of *renuntiatio amicitiae* with the *crimen maiestatis*, of the *inimicus principis* with the *hostis populi Romani*, had left very little room for manoeuvre. Broadly similar considerations underlie Caligula's rhetorical jealousies, Domitian's gladiators and many other apparent anomalies.

Finally, an evaluation of the abolition of charges of *maiestas*. It is not unfair to describe this institution as a gigantic confidence trick. Not only could the emperor do without the *crimen maiestatis*, he was in fact much better off without it; he might be criticised for relying excessively on *populi furor*, but that was a small price to pay. The strangest part of all is the senate's insistence on discarding what should have been seen as its surest shield against oppression: any trial, any judicial debatement of *crimina*, was surely better than none. This should have been abundantly clear by the end of Claudius' reign, and one wonders whether the crisis over the renewal of charges in 62 is not perhaps explicable in terms of the senate's desire to reimpose what was now recognised as a most desirable restraint on the emperor's powers. The senate did acknowledge *populi furor* as the main danger when it belatedly called on Titus for an oath, but it still coupled that with a demand for the abolition of charges instead of firmly seeking the retention of the *lex maiestatis* under all circumstances and the vesting of jurisdiction – under the *lex maiestatis* and not merely ‚on some other charge' – in the senate.

The last word belongs to Tiberius. Seen against this background of duplicity and deceit, his *exercendas leges esse* stands out, whatever its other implications, as a most explicit renunciation of arbitrary power and a most memorable affirmation of the rule of law.

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